European Law Open (2025), page 1 of 32
doi:10.1017/elo.2025.12

CORE ANALYSIS

Debunking the reference champion: on uses, non-uses, and misuses of preliminary references by German courts

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(Received 24 May 2024; revised 14 February 2025; accepted 16 February 2025)

Abstract

Many legal scholars and practitioners consider the German judiciary to be a reliable and cooperative interlocutor of the Court of Justice. German judges refer more and more constructive references than their peers in other Member States – or so the prevailing narrative runs. The present study seeks to dispel and correct this image as reference champion. It identifies three challenges to the preliminary reference procedure in German courtrooms: a complex procedural framework restricting the discretion and obfuscating the duty to refer (1), a reluctant judiciary (2), and instrumental uses as a tool of judicial contestation (3). The study proceeds in four steps. Starting from a *doctrinal* perspective, it sketches the intricacies of the German procedural framework and analyses how it may obstruct preliminary references. Taking a *quantitative* perspective, it places German references in relation to other indicators, such as population size, incoming cases, or the number of judges. Under such a lens, Germany finds itself at the lower end of the spectrum. This reluctance can be traced back to a bundle of factors, such as judicial hierarchies, workload, or lack of knowledge and trust. Shifting to a *qualitative* perspective, the study then explores the instrumental uses of references as a tool of judicial contestation, both externally regarding the EU and internally regarding the German judicial architecture. The study concludes by focusing on a new actor in the reference game – the federal constitutional court. Its two senates have approached the preliminary reference procedure with diametrically opposed logics: the second senate underlines the power of the last, the first senate the potential of the first word. It remains to be seen whether the first senate will carry the day and herald – as a model for the entire German judiciary – a more cooperative future for the preliminary reference procedure.

Keywords: procedural law; preliminary reference; Court of Justice; national courts; German courts

1. Introduction

'German courts are generally loyal partners of the Court of Justice; they refer more questions to Luxembourg than courts from other Member States in similar circumstances.'[1] This is a widely shared and deeply rooted belief among European legal scholars and practitioners. The dominant narrative is that German courts refer to the Court of Justice particularly often and faithfully. Overall, the German judiciary is considered an essential interlocutor of the Luxembourg court, not only due to the sheer quantity but also the high quality of its references.[2] This narrative shapes the

[1]D Thym, 'Friendly Takeover, or: The Power of the "First Word"' 16 (2020) European Constitutional Law Review 187, 201.
[2]See eg U Karpenstein, 'Art. 267 AEUV' in E Grabitz, M Hilf, and M Nettesheim (eds), *Das Recht der Europäischen Union* (83rd edn loose-leaf, Beck 2024) para 5 ('Die Gerichte der Bundesrepublik Deutschland gelten traditionell als vergleichsweise

self-perception of German judges and practitioners, reassuring them that all is well. But what lies behind this image as reference champion?

Under closer scrutiny the realities in German courtrooms reveal to be messier than one would assume. The preliminary reference procedure faces several challenges in German courts: For one, judges are confronted with a fragmented and complex legal framework that complicates the *uses* of this procedure. Further, a quantitative analysis shows that German judges are hesitant or even reluctant to submit references. In other words, the procedure faces the challenge of *non-uses*. And finally, a qualitative exploration suggests that references have often been employed as a tool of contestation – which begs the question to the procedure's *misuses*.

Against this backdrop, this contribution pursues a threefold objective. First, it provides an overview of how the German judiciary has approached the preliminary reference procedure. This includes the intricacies of the national procedure, the judicial practice, and the purposes to which it has been used. Second, this study seeks to identify and analyse the various challenges to this procedure in German courts. And third, it aims at correcting our picture of German courts as a model judiciary or even as champion when it comes to preliminary references. Providing solutions to mitigate and counter these challenges, however, is beyond the scope of this contribution and must be left to further research.

The study will proceed in four steps. Starting from a doctrinal perspective, it will outline the national *procedure* (Section 2). As Germany did not adopt specific provisions for preliminary references, the general rules of civil, administrative, fiscal, social, and criminal jurisdiction apply. This leads to a complex, highly dispersed, and fragmented setup, which proves to be in many respects ill-equipped for the preliminary reference procedure. Taking a quantitative perspective, the study will then assess the judicial *practice* (Section 3). As noted before, German judges are often hailed as champions when it comes to the preliminary reference procedure. And indeed, they refer – in absolute terms – more than any other Member State judiciary. Yet, once German references are placed in relation to other indicators, such as population size or the reference per judge, Germany finds itself at the lower end of the spectrum. This reluctance is caused by a bundle of factors, such as workload, judicial hierarchies, or lack of knowledge and trust. Shifting towards a qualitative perspective, the study will then explore the *purposes*, for which references have been used by German courts (Section 4). Instead of providing an exhaustive assessment, this part will concentrate only on one purpose that poses a particular challenge to this mechanism: its operation as a tool of judicial contestation. While the preliminary reference procedure has been used by German courts to challenge the impact of EU law, it has also empowered national courts vis-à-vis the legislator, executive, and higher courts. The final Section will concentrate on the *potential* of a new actor in the reference game – the federal constitutional court (Section 5). This court has made an ambivalent first appearance. Its second senate has used the preliminary ruling mechanism in *OMT* and *PSPP* as a tool for contestation. The first senate's decision in the *Right to be forgotten II*, by contrast, opens the door for a closer cooperation between the Luxembourg and Karlsruhe court on issues of fundamental rights protection.

Before diving into these issues, some readers might justifiably ask why this soul-searching mission into the minds and hearts of German judges should be of any interest to a wider audience. My answer is threefold: First, there have been many studies assessing the performance of national judiciaries in the preliminary reference procedure. These include Belgian, Croatian, Dutch, Greek,

vorlagefreundlich'); B Wägenbaur, 'Verfahrensrecht der Unionsgerichtsbarkeit' in S Leible and JP Terhechte (eds), *Europäisches Rechtsschutz- und Verfahrensrecht* (2nd edn, Nomos 2021) § 7, para 95 (noting that German courts pursue 'relativ oft den Dialog mit dem EuGH') and more generally EJ Lohse, *Rechtsangleichungsprozesse in der Europäischen Union* (Mohr Siebeck 2017) 618 (arguing that the bigger, founding Member States, including Germany, take the lead). On this 'friendliness', see already J Schwarze, *Die Befolgung von Vorabentscheidungen des Europäischen Gerichtshofs durch deutsche Gerichte* (Nomos 1988) 12. Beyond Germany, see eg B Davies, 'Resistance to European Law and National Constitutional Identity in Germany' 21 (2015) European Law Journal 434, 438 ('German courts have been the most prolific users of the preliminary ruling mechanism').

https://doi.org/10.1017/elo.2025.12 Published online by Cambridge University Press

Irish, Polish, or Slovenian courts.[3] These contributions offer important insights. While the preliminary reference procedure essentially relies on its handling by national courts, it is extremely difficult to assess from the outside if a certain judiciary embraces or rather rejects this mechanism. Therefore, such studies allow us to check whether the current form of the preliminary ruling mechanism works. Curiously, however, the German judiciary, by far the largest national judiciary in the EU, has not received much scholarly attention so far.[4] The present study seeks to fill this gap. Second, it pursues a more comprehensive approach than the literature mentioned before. Instead of concentrating on factors that motivate or discourage judges from referring, this contribution takes a more holistic perspective and assesses multiple, interdependent challenges in German courtrooms. This might provide a useful template to assess the situation in other national contexts. And third, any mitigation or aggravation of these challenges in Germany can have an impact on the Court of Justice and the wider circle of national courts across Europe. On the one hand, the performance of German courts has an impact on the number of references reaching the Court of Justice, flooding or draining its docket, and on the cooperation with Luxembourg, leading to more or less cooperative interactions. On the other hand, the German judiciary, especially its constitutional court, is considered as the most influential judiciary in Europe.[5] Any developments in this jurisdiction will thus be closely followed by its peers in other Member States.

2. Uses: the challenge of ill-equipped procedures

Being a founding Member State, the German judiciary has been exposed to the preliminary reference procedure since the mechanism's inception. For that reason, one would expect the national procedural framework to be well-equipped for preliminary references. Upon closer inspection, however, it turns out to be fragmented, complex, and difficult to navigate even for well-versed practitioners. Generally, references are subject to two legal regimes. As far as the reference itself is concerned, Article 267 TFEU and the Court's statute apply. At the same time, references are embedded in the main proceedings, which are governed by national procedural law. Article 23 of the Court's statute only presupposes that a referring judge 'suspends its proceedings.' Like many other jurisdictions, the German system does not contain any specific provisions on preliminary references.[6] Instead, the rules are scattered among the individual jurisdictions, civil,

[3]On Belgian courts, see U Jaremba and M Kappé, 'The Unfolding Story of Judicial Dialogue in the EU: The Coercive and Persuasive Motives Behind the Participation of Belgian Highest Courts in the Preliminary Ruling Procedure' 25 (2024) German Law Journal 690. On Slovenia and Croatia, see eg M Glavina, 'Reluctance to Participate in the Preliminary Ruling Procedure as a Challenge to EU Law: A Case Study on Slovenia and Croatia' in A Wallermann and C Rauchegger (eds), *The Eurosceptic Challenge* (Hart 2021) 191. On Dutch courts, see J Krommendijk, 'The Highest Dutch Courts and the Preliminary Ruling Procedure. Critically Obedient Interlocutors of the Court of Justice' 25 (2019) European Law Journal 394. On Greek courts, see V Passalacqua, 'Explore the Silence: The Absence of Preliminary References from Greek Courts on Migration and Asylum' 25 (2024) German Law Journal 977. On Irish courts, see J Krommendijk, 'Irish Courts and the European Court of Justice. Explaining the Surprising Move from an Island Mentality to Enthusiastic Engagement' 5 (2020) European Papers 825. On the Polish judiciary, see U Jaremba, 'Polish Civil Judiciary vis-a-vis the Preliminary Ruling Procedure: In Search of a Mid-Range Theory' in B de Witte et al (eds), *National Courts and EU Law* (Elgar 2016) 49.

[4]An exception is the broader study by T Nowak et al, *National Judges as European Union Judges: Knowledge, Experiences and Attitudes of Lower Court Judges in Germany and the Netherlands* (Eleven 2011), which does not focus specifically on the preliminary reference procedure.

[5]C Grabenwarter, 'The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives. General Report' in XVIth Congress of the Conference of European Constitutional Courts (2014): 'Many national reports submitted by other constitutional courts … mention the German Federal Constitutional Court as the most frequently cited foreign constitutional court, regardless of regional or linguistic factors'. See also A von Bogdandy, C Grabenwarter, and PM Huber, 'Constitutional Adjudication in the European Legal Space' in ids. (eds), *The Max Planck Handbooks in European Public Law: Volume III* (Oxford University Press 2020) 1, 11 or T Ellerbrok and R Pracht, 'Das Bundesverfassungsgericht als Taktgeber im horizontalen Verfassungsgerichtsverbund' 56 (2021) *Europarecht* 188.

[6]Only few jurisdictions feature provisions governing preliminary references, see eg in Austria § 90a Gerichtsorganisationsgesetz or in Spain, Art 4bis Ley Orgánica del Poder judicial. With regard to the latter, see

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administrative, labour, social, family, criminal, tax, and constitutional, each with their own branch of courts and procedural codes.[7]

While this fragmentation is neither unique nor problematic per se, the following section will argue that the German procedural setup is particularly ill-equipped for preliminary references. This requires us to zoom into the intricacies of German procedural law. To avoid getting lost in this rabbit hole we will focus on civil procedure, which covers the majority of cases before German courts.[8] Other jurisdictions will be addressed only selectively, although many findings will apply to them as well. Challenges arise especially with regard to the *discretion* and the *duty* to refer. In the former context (see Section A), recent developments do not only restrict the judges' room for discretion but also render the exercise of this discretion subject to remedies by parties opposing the reference. In the latter context (see Section B), the complex procedural setup makes it difficult to discern when the duty to refer actually applies. Eventually, it might foster a diffusion of responsibility. In addition, remedies to enforce this duty are few and subject to high thresholds. Taken together, these four factors hinder the smooth functioning of the preliminary reference procedure: they unduly restrict the judges' discretion and provide insufficient mechanisms to ensure compliance with the duty to refer.

A. Constrained discretion to refer

National courts have the 'widest discretion' in referring matters to Luxembourg.[9] This freedom is an 'inherent part of the system of cooperation' established by the preliminary reference procedure.[10] Importantly, that discretion can be exercised at whatever stage of the proceedings judges consider appropriate.[11] A slowly growing body of case law started to restrict this discretion in German courts. This applies especially to procedures governed by the Code of Civil Procedure ('ZPO'). Matters below a certain monetary threshold are adjudicated in first instance at the 'Amtsgericht', whereas those crossing the threshold come before the regional court ('Landgericht'). The latter is divided into different chambers of three judges. Yet, for reasons of efficiency cases are usually decided by a single judge. If the case is of 'fundamental significance', the respective judge must exceptionally submit the dispute to his or her chamber.[12] According to a recent line of jurisprudence, this might be the case when a judge intends to submit a preliminary

D Sarmiento and E Arnaldos Orts, 'La cuestión prejudicial europea en la jurisdicción española, ¿un mito desmentido por las cifras?' 27 (2023) *Revista de Derecho Comunitario Europeo* 75, 80 ff.

[7]For general rules, see the Courts Constitution Act ('Gerichtsverfassungsgesetz', GVG), for the individual jurisdictions, the Code of Civil Procedure ('Zivilprozessordnung', ZPO), the Code of Administrative Court Procedure ('Verwaltungsgerichtsordnung', VwGO), the Labour Courts Act ('Arbeitsgerichtsgesetz', ArbGG), the Social Courts Act ('Sozialgerichtsgesetz', SGG), the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction ('Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit', FamFG), the Code of Criminal Procedure ('Strafprozessordnung', StPO), the Tax Courts Code ('Finanzgerichtsordnung', FGO), and the Act on the Federal Constitutional Court (BVerfGG).

[8]In 2023, first instance courts closed 752,424 cases before the 'Amtsgerichte' and 293,642 cases before the 'Landgerichte' in civil matters. The numbers are much lower for administrative (163,498 cases), social (269,176 cases), labour (275,550 cases), or tax courts (26,113 cases), see the 'Statistische Berichte' by Destatis, *Zivilgerichte 2023*, EVAS-Nummer 24231 and *Verwaltungsgerichte 2023*, EVAS-Nummer 24251; *Sozialgerichte 2023*, EVAS-Nr. 24271; *Arbeitsgerichte 2023*, EVAS-Nr. 24281; *Finanzgerichte 2023*, EVAS-Nr. 24261.

[9]See only Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* EU:C:2010:363, para 41.

[10]Case C-564/19 *IS* EU:C:2021:949, para 68.

[11]See eg C-340/22 *Cofidis* EU:C:2023:1019, para 30; Case C-173 09 *Elchinov* EU:C:2010:581, para 26. See also B Schima, 'Art. 267 TFEU' in M Kellerbauer et al (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2nd edn, Oxford University Press 2024) paras 31–2.

[12]See § 348(3) No. 2 or § 348a(2) No.1 ZPO.

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reference.[13] If the single judge disregards this obligation, he might even face a motion for recusal due to a flagrant breach of procedure.[14]

The compatibility of this mechanisms with Article 267 TFEU has reached the Court of Justice in several instances. Even though the Court eventually refrained from assessing this practice,[15] Advocate General Rantos stressed that Article 267 TFEU precludes such a rule. In this context, he reemphasised that the national court must remain 'free to refer to the Court for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate.'[16] Along these lines, further references raised this 'disconcerting development' to the attention of the Court but were later removed from the Court's register.[17]

In parallel, it has become highly controversial, whether there are remedies against the decision to refer. This might place an additional limitation on the judges' discretion. Generally, German law allows to challenge decisions and orders of courts, which are no judgments, through complaints.[18] Nevertheless, it remains controversial whether this applies also to preliminary references. The case law of the Court is ambiguous in this respect and is quoted both by those advocating and opposing the possibility to appeal such decisions.[19]

To start with, it is established jurisprudence that decisions referring a question to the Court can remain subject to the remedies normally available under national law.[20] In *Cartesio*, however, the Court stated that national law cannot permit higher instance courts to set aside decisions to refer or to order the resumption of national proceedings while awaiting the return of the preliminary reference.[21] At the same time, the Court did not consider that appeals against decisions to refer were incompatible with Union law per se. In more recent case law, it stressed that

> it is not for the Court, in view of the distribution of functions between itself and the national courts, to determine whether the order for reference was made in accordance with the rules of national law governing the organisation of the courts and their procedure. Hence, the Court is bound by an order for reference made by a court or tribunal of a Member State, *in so far as that order has not been rescinded on the basis of a means of redress provided for by national law*.[22]

At first glance, there are indeed good reasons for admitting such remedies. Referrals have an immediate impact on the parties. They imply a considerable delay, additional submissions, and therefore higher costs. Accordingly, referring the case to Luxembourg might not always be in the

[13]Oberlandesgericht Stuttgart, Order of 1 July 2020, 16a W 3/20, paras 50–51 and obiter dicta by Bundesgerichtshof, Orders of 31 March 2020, XI ZR 198/19, para 15 and 11 February 2020, XI ZR 648/18, para 48.

[14]See § 42 ZPO. In this sense, see the Oberlandesgericht Stuttgart cited before. Rejecting such a view, see Oberlandesgericht Jena, Order of 14 March 2022, 6 W 414/21, paras 27–30.

[15]One court asked for the compatibility of this practice with Art. 267 TFEU, but the CJEU considered this reference to be inadmissible, see Case C-100/21 *Mercedes-Benz Group* EU:C:2023:229, para 54. In another case, a party argued that – due to the lack of submitting the dispute to the chamber – the reference was inadmissible under Art. 267 TFEU. The Court rejected this argument in Case C-492/17 *Südwestrundfunk/Rittinger* EU:C:2018:1019, para 32 as'it is not for the Court to determine whether the decision to make the reference was taken in accordance with the national rules on the organisation of the courts and their procedure'.

[16]Advocate General Rantos in Case C-100/21 *Mercedes-Benz Group*, para 75.

[17]See the referrals in Case C-506/21 and C-240/21.

[18]In civil procedures, §§ 252, 567 ZPO. For other procedures, see eg § 146 VwGO, § 114 SGG, § 304 StPO, § 128 FGO.

[19]See eg G Butler and J Cotter, 'Just Say No! Appeals Against Orders for a Preliminary Reference' 26 (2020) European Public Law 615; M Broberg and N Fenger, 'Preliminary References as a Right – But for Whom? The Extent to Which Preliminary Reference Decisions Can Be Subject to Appeal' 36 (2011) European Law Review 276; M Bobek, 'Cartesio: Appeals against an Order to Refer under Article 234(2) EC Treaty Revisited' 29 (2010) Civil Justice Quarterly 307.

[20]Case 146/73 *Rheinmühlen-Düsseldorf* EU:C:1974:12, para 3.

[21]Case C-210/06 *Cartesio* EU:C:2008:723, para 93. See also Case C-525/06 *Nationale Loterij* EU:C:2009:179, para 7 and Case C-564/19 *IS (Illégalité de l'ordonnance de renvoi)* EU:C:2021:949, para 72.

[22]Case C-132/20 *Getin Noble Bank* EU:C:2022:235, para 70 (emphasis added). See also Joined Cases C-748/19 to C-754/19 *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* EU:C:2021:931, para 44; Case 65/81 *Reina* EU:C:1982:6, para 7.

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parties' interest. In this spirit, some argue that – even if not the referral itself – the decision suspending the national proceedings should be subject to remedies.[23] The court seized to rule on such a complaint could assess, whether the reference is based on a manifestly erroneous assessment of the facts or the applicable law.

Nevertheless, such a distinction between the decision to refer and the decision to stay the proceedings will be difficult to maintain. A reference without suspending the main proceedings is hardly feasible and not in line with Article 23 of the Court's statute. As such, lifting the decision on the suspension will have an immediate bearing on the referral.[24] In case of administrative, financial, and criminal procedural law, many argue that decisions to refer should be considered as mere 'procedural guidance', which are specifically excluded from complaints in the respective procedural codes.[25] But also in civil procedures, where such an exception does not exist, many higher regional courts have rejected the admissibility of complaints against the decision to refer.[26] First, these courts refer to the functioning of the preliminary reference procedure, which is not only an individual remedy but also an inter-court dialogue seeking to guarantee the uniformity of EU law. This might compel judges in certain situations to refer also against the express will of the parties. Second, the cooperation under this mechanism requires that national courts are as free as possible to refer, at any stage of the proceedings, any question they consider to be necessary. Remedies would severely circumscribe this discretion.[27] And third, the complaint against the decision to suspend proceedings seeks preventing an unjustified standstill. Yet, preliminary references prepare and foster the decision-making process in the main proceedings.

While there was some considerable disagreement between the higher regional courts,[28] the *Bundesgerichtshof* has left this issue explicitly open.[29] As such, it remains to be seen which position will carry the day.

B. Obfuscated duty to refer

According to the Court of Justice, the duty to refer under Article 267(3) TFEU does not only comprise those courts of last instance, against whose decisions there is generally no appeal (abstract view), but also to decisions, which are – in the specific case – not subject to further remedies (concrete view). In this sense, the Court embraced the idea of 'concrete appealability.'[30] With regard to the German legal system, this makes things quite tricky. Indeed, the procedural framework fails to allocate the obligation under Article 267(3) TFEU in any clear and predictable

[23]See Oberlandesgericht Jena, Order of 9 December 2022, 4 W 17/22, paras 40–41 and Oberlandesgericht Rostock, Order of 12 November 2012, I Ws 321/12. See also U Karpenstein, 'Art. 267 AEUV' in E Grabitz, M Hilf, and M Nettesheim (eds), *Das Recht der Europäischen Union* (81st edn loose-leaf, Beck 2024) para 43; A Middeke, 'Das Vorabentscheidungsverfahren' in HW Rengeling et al (eds), *Handbuch des Rechtsschutzes in der Europäischen Union* (3rd edn, Beck 2014) § 10, para 90; V Lipp, 'Rechtsschutz gegen Vorlageverstöße' in B Gsell and WJ Hau (eds), *Zivilgerichtsbarkeit und Europäisches Justizsystem* (Mohr Siebeck 2012) 103.

[24]In this sense Oberlandesgericht Brandenburg, Order of 6 October 2014, 4 W 33/14, para 15.

[25]So-called 'prozessleitende Verfügung', see § 146(2) VwGO, § 128(2) FGO, or § 305 StPO. See eg Verwaltungsgerichtshof Mannheim, Order of 17 April 1986, 11 S 216/86; Bundesfinanzhof, Order of 27 January 1981, VII B 56/80 and L Hustus, 'Strafgerichtsbarkeit' in U Karpenstein et al (eds), *Handbuch Rechtsschutz in der Europäischen Union* (4th edn, Beck 2024) § 34 para 74. For an application by analogy, see B Wegener, 'Art. 267 AEUV' in C Calliess and M Ruffert (eds), *EUV/AEUV* (6th edn, Beck 2022) para 26 and U Ehricke, 'Art. 267 AEUV' in R Streinz (ed), *EUV/AEUV* (Beck 2018) para 67.

[26]Oberlandesgericht Stuttgart, Order of 10 August 2022, 23 W 42/21, paras 10–15; Oberlandesgericht München, Order of 18 October 2012, Verg 13/12; Oberlandesgericht Köln, Order of 13 May 1977, 6 W 80/76.

[27]See note 19 and G Butler, 'Lower Instance National Courts and Tribunals in Member States and Their Judicial Dialogue with the Court of Justice of the European Union' 4 (2021) Nordic Journal of European Law 19, 31 ff who argues for an exclusion of such appeals under EU law.

[28]See n 23 and n 26. However, the Oberlandesgericht Jena has adjusted its position, see Orders of 26 July 2024, 4 W 296/23 and 15 April 2024, 4 W 31/22 now explicitly rejecting the admissibility of such complaints.

[29]See Bundesgerichtshof, Order of 21 March 2023, EnVR 83/20, para 2.

[30]See eg Case C-495/03 *Intermodal Transports* EU:C:2005:552, para 32 ff.

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manner. Instead, it establishes a complex and confusing system, which fosters a diffusion of responsibility.

Starting with the abstract view, all federal courts, such as the Federal Court of Justice (*Bundesgerichtshof*), the Federal Administrative Court (*Bundesverwaltungsgericht*), the Federal Fiscal Court (*Bundesfinanzhof*), the Federal Labour Court (*Bundesarbeitsgericht*), and the Federal Social Court (*Bundessozialgericht*), as well as the constitutional courts at the state and federal level are subject to the duty in Article 267(3) TFEU.[31] In this context, it should be stressed that constitutional complaints before the *Bundesverfassungsgericht* do not constitute a 'remedy' in the sense of Article 267(3) TFEU.[32] Since such a complaint is also possible against judicial decisions (so-called 'Urteilsverfassungsbeschwerde'), even the federal courts would be excluded from the duty to refer. Such an interpretation would hardly meet the aim of Article 267(3) TFEU and severely undermine the cooperation among Luxembourg and the German judiciary.[33] As such, all federal courts come under the duty to refer.

Switching to the concrete view muddles this picture. Under German procedural law, judgments can generally be appealed on factual and legal grounds in second instance (so-called 'Berufung') and on legal grounds in third instance (so-called 'Revision'). Especially in civil and administrative proceedings, however, the court, whose decision is to be appealed, must in many cases *admit* the appeal.[34] In some cases, the decision refusing to admit an appeal can be challenged with a complaint. This leads to a highly complex picture when it comes to determination of who is subject to the obligation under Article 267(3) TFEU.[35]

To provide an example, first instance judgments by civil courts can only be appealed once they reach a certain monetary threshold (600 EUR). In all other cases, the appeal must be specifically admitted by the court of first instance.[36] When the threshold is not met and appeal not granted, there is no further possibility to challenge the judgment. In consequence, the first instance court becomes a court of last instance under Article 267(3) TFEU. Similarly, second instance courts must admit the appeal in third instance.[37] However, their decision to deny an appeal can be challenged before third instance courts.[38] In this complaint procedure, the third instance court can review whether the conditions for granting an appeal, such as the 'fundamental significance' of the case, are met. This is usually the case when unresolved questions of EU law arise. For that reason, the complaint procedure is considered a 'remedy' under Article 267(3) TFEU.[39] If the conditions for such a complaint are met (the monetary threshold is 20,000 EUR), the duty of Article 267(3) TFEU shifts to the third instance, if not, the second instance court is obliged to refer.

Confused? I wouldn't be surprised! Even well-versed practitioners get caught up in the intricacies of this system. Indeed, it is difficult to understand, for both litigants and judges, when the obligation to refer actually bites. Many judges might thus disregard their obligation to refer in their daily practice. First instance judges in civil procedures, for example, may infringe Article 267(3) TFEU by neither referring nor allowing the appeal in cases that do not reach the value of 600 EUR. Such day-to-day cases can still raise contentious issues of EU law, such as questions of

[31]On the latter, see already BVerfG, Order of 29 May 1974, BvL 52/71 – *Solange I*.

[32]The complaint is enshrined in Art 93 No 4a of the Basic Law.

[33]See U Karpenstein, 'Das Vorabentscheidungsverfahren' in Leible and Terhechte (n 2) para 53; V Hellmann, '§ 90 BVerfGG' in T Barczak (ed), *BVerfGG. Mitarbeiterkommentar zum Bundesverfassungsgerichtsgesetz* (de Gruyter 2018) para 5.

[34]In civil procedures, see §§ 511(2) and 543(1) ZPO, in administrative procedures, see §§ 124, 132 VwGO.

[35]In much detail, also concerning the procedures before labour, social, and tax courts, see J Rauber, 'Vorlagepflicht und Rechtsmittelzulassung' 55 (2020) Europarecht 22.

[36]See § 511(1) and (4) ZPO. The grounds for admitting an appeal are the 'fundamental significance' of the case or 'wherever the further development of the law or the interests in ensuring uniform adjudication require a decision to be handed down by the court of appeal'.

[37]§ 543(1) and (2) ZPO.

[38]The 'Nichtzulassungsbeschwerde' in § 544(1) ZPO.

[39]Case C-99/00 *Lyckeskog* EU:C:2002:329, para 16. See also BVerfG, Order of 1 April 2008, 2 BvR 2680/07 (civil law) and Order of 28 August 2014, 2 BvR 2639/09 (administrative law).

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consumer protection or passenger rights. This is all the more relevant as the parties in such cases do not require legal representation. Similar infringements can arise in complaint procedures against decisions to not admit an appeal, which lead to a back-and-forth between second and third instance. Here, litigants might face a diffusion of responsibility for the obligation to refer between different levels of courts.[40]

This is a problem. Especially under Article 267(3) TFEU, the preliminary ruling mechanism is a further layer of effective judicial protection in the service of the individual.[41] Even if there may be good reasons for this complex appeal system, it seems ill-equipped for the smooth operation of the preliminary reference mechanism.

This challenge to the duty to refer under Article 267(3) TFEU is further aggravated by the lack of sufficient remedies to enforce this obligation. Leaving remedies under European law, such as state liability,[42] infringement proceedings,[43] or applications before the ECtHR[44] aside,[45] three possible remedies, ordinary, extraordinary, and constitutional, might be envisaged. To start with, there are little to no possibilities for *ordinary* appeal. Most cases under Article 267(3) TFEU will concern jurisdictions of last instance. This leaves the few cases in which lower courts have a duty to refer, such as those under the *Foto-Frost* line of jurisprudence. These could be appealed in higher instances.

Second, some suggest employing an *exceptional* remedy granted in the event a party's right to be heard has been disregarded.[46] This remedy allows applicants to continue proceedings against which no legal remedies are available if the respective court has infringed the parties' right to an effective and fair legal hearing guaranteed by Article 103(1) of the German Basic Law. This remedy is raised before the *iudex a quo*, meaning the judge or court whose decision is challenged. Initially, the *Bundesgerichtshof* contemplated whether this remedy could be applied also to other procedural rights, such as the right to a lawful judge under Article 101(1) of the Basic Law.[47] Infringements of the duty to refer under Article 267(3) TFEU could have been addressed in this way. Being a highly exceptional remedy, however, this procedural tool cannot be extended beyond its scope of application. As such, it is limited to the right to be heard.[48] Subsequently, this narrow interpretation has permeated the case law of German apex courts.[49]

[40]Rauber (n 35).

[41]See eg T Tridimas, 'Bifurcated Justice: The Dual Character of Judicial Protection in EU Law' in A Rosas et al (eds), *The Court of Justice and the construction of Europe* (Asser Press 2013) 367.

[42]Case C-224/01 *Köbler* EU:C:2003:51, para 35.

[43]Case C-416/17 *Commission v France (Précompte mobilier)* EU:C:2018:811.

[44]On the high thresholds, see ECtHR, Applications nos. 3989/07 and 38353/07 *Ullens de Schooten and Rezabek v Belgium*. See J Krommendijk, '"Open Sesame!" Improving Access to the CJEU by Obliging National Courts to Reason Their Refusals to Refer' 42 (2017) European Law Review 46; M Broberg, 'National EU Courts Must Seek Advice in Luxembourg or Face Reproach in Strasbourg' (2021) European Human Rights Law Review 162.

[45]In detail, see M Broberg, 'National Courts of Last Instance Failing to Make a Preliminary Reference: The (Possible) Consequences Flowing Therefrom' 22 (2016) European Public Law 243; Z Varga, 'National Remedies in the Case of Violation of EU Law by Member State Courts' 54 (2017) Common Market Law Review 51; A Iliopoulou-Penot, 'La sanction des juges suprêmes nationaux pour défaut de renvoi préjudiciel' (2019) *Revue française de droit administratif* 139.

[46]So-called 'Anhörungsrüge', see § 321a ZPO. See also § 152a VwGO, § 133a FGO, § 178a SGG.

[47]In the context of § 321a ZPO, see Bundesgerichtshof, Order of 19 January 2006, I ZR 151/02 and D Poelzig, 'Die "Vorlagerüge" gemäß § 321 a ZPO analog' 121 (2008) Zeitschrift für Zivilprozess 233, 237 ff. In the context of § 152a VwGO, see eg Oberverwaltungsgericht Lüneburg, Order of 8 February 2006, 11 LA 82/05 and FO Kopp and WR Schenke, *Verwaltungsgerichtsordnung* (29th edn, Beck 2023) § 152a, para 22 ff.

[48]See only HJ Musielak and A Hüntemann, '§ 321a ZPO' in W Rauscher and T Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (7th edn, Beck 2025) para 18 and R Rudisile and S Emmenegger, '§ 152a' in F Schoch, JP Schneider, and W Bier (eds), *VwGO* (46th edn loose-leaf, Beck 2024) para 36.

[49]With regard to § 321a ZPO, see Bundesgerichtshof, Order of 16 April 2021, XI ZR 137/20. With regard to § 152a VwGO, see Bundesverwaltungsgericht, Order of 20 March 2013, 7 C 3/13, para 4. For § 133a FGO, see Bundesfinanzhof, Order of 17 June 2005, VI S 3/05. For § 178a SGG, see Bundessozialgericht, Order of 28 September 2006, B 3 P 1/06 C, para 15.

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Third, disregarding the duty to refer under Article 267(3) TFEU can give rise to a *constitutional* complaint based on the right to a 'lawful judge' under Article 101(1) of the Basic Law.[50] That provision guarantees that individuals are not deprived of the court or judge with jurisdiction over the respective proceedings. This right does not only encompass national courts but also the Luxembourg judges. Thus, a court of final instance that disregards its duty to submit a preliminary reference infringes a constitutional right.[51] Nevertheless, the *Bundesverfassungsgericht* does not understand itself as 'oberstes Vorlagegericht.' Instead, it discharges this task with outmost restraint and only reviews whether the handling of Article 267(3) TFEU is 'manifestly untenable.'[52] In this context, Karlsruhe identified three cases in which such a situation might arise.[53] The first situation concerns a *fundamental disregard* of the duty to refer. Although the respective court recognises that EU law is relevant for the resolution of the case before it and demonstrates doubts as to its correct interpretation or application, it does not submit a reference. The second scenario concerns the *deliberate deviation* from the case law of the Court without referring. The third and most controversial case relates to situations in which the respective judges face an *incomplete case law* of the Court.[54]

Initially, Karlsruhe's two senates handled the third category differently. More leniently, the second senate refused to fully review the national court's obligation under Article 267(3) TFEU and simply assessed whether a different interpretation of the respective EU law from that chosen by the national court is 'clearly preferable.' Put differently, Article 101(1) of the Basic Law is not infringed, when the national court's interpretation is 'at least justifiable.'[55] Much stricter, the first senate assessed whether the national court handled its duty to refer under Article 267(3) TFEU, including the *CILFIT*-criteria, in a reasonable manner.[56] In particular, it must provide reasons as to whether and why the question is an *acte claire* or an *acte eclairé*. Under the pressure of the academic literature,[57] the second senate followed suit and aligned its jurisprudence.[58]

Some scholars have argued that 'this may be one of the most efficient enforcement mechanisms with respect to the duty to make preliminary references.'[59] Yet, this impression can hardly withstand closer scrutiny. First, we can assume that only a very small portion of constitutional complaints is successful. Between 2010 and 2023, the Karlsruhe court has decided 118 cases

[50]'No one may be removed from the jurisdiction of his lawful judge.'

[51]In a comparative perspective, see C Lacchi, *Preliminary References to the Court of Justice of the EU and Effective Judicial Protection* (Intersentia 2020) 113–7, 271 ff.

[52]See eg BVerfG, Judgment of 28 January 2014, 2 BvR 1561/12, paras 180–5, Order of 31 May 1990, 2 BvL 12, 13/88, 2 BvR 1436/87 – *Absatzfonds*. See also G Britz, 'Verfassungsrechtliche Effektuierung des Vorabentscheidungsverfahrens' 65 (2012) *Neue Juristische Wochenschrift* 1313, 1314.

[53]BVerfG, Order of 6 July 2010, 2 BvR 2661/06 – *Honeywell*, para 90. In detail, see A Betz, *Die verfassungsrechtliche Absicherung der Vorlagepflicht* (Mohr Siebeck 2013) 149–52; D Dittert, 'Rapport Allemand' in L Coutron (ed), *L'obligation de renvoi préjudiciel à la Cour de justice. Une obligation sanctionnée?* (Bruylant 2014) 59, 61–5.

[54]For examples, where the BVerfG found a violation, see Orders of 14 January 2021, 1 BvR 2853/19, 6 October 2017, 2 BvR 987/16 and 19 December 2017, 2 BvR 424/17.

[55]BVerfG, Order of 6 July 2010, 2 BvR 2661/06 – *Honeywell*, paras 89–90.

[56]See eg BVerfG, Orders of 25 February 2010, 1 BvR 230/09, paras 20–21, 25 January 2011, 1 BvR 1741/09, para 104 and 19 July 2011, 1 BvR 1916/09, paras 97–8.

[57]See, among many others, eg L Michael, 'Grenzen einer verschärften Vorlagenkontrolle des Art. 267 Abs. 3 AEUV durch das BVerfG' 67 *JuristenZeitung* (2012) 870, 877; M Bäcker, 'Altes und Neues zum EuGH als gesetzlichem Richter' 64 (2011) *Neue Juristische Wochenschrift* 270, 272; W Roth, 'Verfassungsgerichtliche Kontrolle der Vorlagepflicht an den EuGH' (2009) *Neue Zeitschrift für Verwaltungsrecht* 345, 350.

[58]BVerfG, Order of 29 April 2014, 2 BvR 1572/10, para 13: 'Beide Senate stimmen – unbeschadet zum Teil abweichender Formulierungen – in der Sache überein'. See also BVerfG, Orders of 8 November 2023, 2 BvR 1079/20, para 86, 19 December 2017, 2 BvR 424/17, para 43, and 17 November 2017, 2 BvR 1131/16, para 29.

[59]M Broberg and N Fenger, *Broberg and Fenger on Preliminary References to the European Court of Justice* (Oxford University Press 2021) 235. See also C Lacchi, 'Review by Constitutional Courts of the Obligation of National Courts of Last Instance to Refer a Preliminary Question to the Court of Justice of the EU' 16 (2015) German Law Journal 1663, 1669.

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concerning a violation of the duty to refer. Out of these, it ascertained a violation in 29 cases.[60] While this success rate of 25 per cent seems like a relatively strong outcome, it must be noted that the *Bundesverfassungsgericht* usually rejects between 97 and 98 per cent of its cases through a so-called 'Nichtannahmebeschluss',[61] an order refusing to admit the complaint which is usually neither reasoned nor published.[62] If we extrapolate these numbers to the complaints concerning the duty to refer, we can estimate that there have been over 4,500 complaints since 2010. In consequence, the successful cases based on a violation of the duty to refer would amount to approximately 0,6 per cent.[63] If we add the fact that the psychological thresholds to go to Karlsruhe – especially in smaller litigations – are extremely high, we can ascertain that constitutional complaints are probably not the most effective way to police the obligation to refer under Article 267(3) TFEU.

Second, the current standard of review boils down to a duty to give reasons.[64] As such, many have criticised that there is no strict scrutiny by the federal constitutional court. Some demand full control of the *CILFIT*-criteria,[65] others suggest differentiating between references for interpretation, which should be subject to lesser control, and references for validity, which should be subject to stricter scrutiny.[66] A reference under Article 267(1)(b) TFEU serves as substitute for judicial review and compensates for the demanding standing requirement for direct action before the Court of Justice (see Article 263(4) TFEU). Arguably, this argument cannot be extended to the reference for interpretation, which serves primarily the uniform application of EU law. Such a distinction, however, is difficult to sustain. The Court itself has stressed in *Köbler* – which concerned a reference under Article 267(1)(a) TFEU – that 'it is, in particular, in order to prevent rights conferred on individuals by Community law from being infringed that . . . a court against whose decisions there is no judicial remedy under national law is required to make a reference to the Court of Justice.'[67] In any case, it should be noted that the Court of Justice has placed an increasing emphasis on the duty to refer. It not only clarified the *CILFIT* criteria in *Consorzio*,[68] but also found – for the first time – a violation of Article 267(3) TFEU in an infringement procedure against France.[69] Seen in this light, it seems that the federal constitutional court's standard lacks behind.

3. Non-uses: the challenge of reluctant application

The procedural framework is not the only challenge to the preliminary reference procedure in German courts. Shifting to a quantitative, comparative perspective, a closer inspection reveals that German judges are much more reluctant to submit references than their peers in other Member States. To many this might come as a surprise. The prevalent narrative runs as follows: German courts started embracing the preliminary reference procedure only slowly. Unlike its Dutch

[60]These cases were identified through the decision search function on the website of the Bundesverfassungsgericht. The search terms used were 'Art. 267' and 'Art. 101'.

[61]For the years 2016 to 2020, see BVerfG, *Jahresstatistik 2020*, p 19.

[62]See §§ 93a and b BVerfGG. In 2023, 79,93 per cent of these orders contained no reasoning, 15,56 per cent only one sentence, see BVerfG, *Jahresbericht 2023*, p 54.

[63]The overall success rate of constitutional complaints was 1.66 per cent in 2023, see BVerfG (n 63) p 53.

[64]For some, this aligns with the more recent case law of the Court of Justice, see FX Millet, 'From the Duty to Refer to the Duty to State Reasons' 15 (2023) European Journal of Legal Studies 7. See also Case C-144/23 *KUBERA* EU:C:2024:881, paras 61–5.

[65]See eg F Kainer and J Persch, 'Zur Kontrolle der Vorlagepflicht des Art. 267 Abs. 3 AEUV durch das BVerfG' 18 (2021) *Zeitschrift für das Privatrecht der Europäischen Union* 156; C Thomale, 'Zur subjektivrechtlichen Durchsetzung der Vorlagepflicht zum EuGH im europäischen Verfassungsgerichtsverbund' 51 (2016) *Europarecht* 510, 524 ff.

[66]Michael (n 57) 877–80; N Marsch, 'Art. 267 AEUV' in Schoch, Schneider, and Bier (n 48) para 75.

[67]Case C-224/01 *Köbler* EU:C:2003:51, para 35.

[68]Case C-561/19 *Consorzio Italian Management e Catania Multiservizi* EU:C:2021:799. Critically, see D Petrić, 'How to Make a Unicorn or "There Never was an 'Acte Clair' in EU Law"' 17 (2021) Croatian Yearbook of European Law and Policy 307.

[69]Case C-416/17 *Commission v France (Advance payment)* EU:C:2018:811.

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counterparts, they were bystanders when the foundational jurisprudence was crafted.[70] This attitude changed later on and, according to the narrative, German courts became one of the most active interlocutors of the Court of Justice. Today, German judges seek the dialogue with the Court of Justice particularly often.[71] In this sense, many contend that German courts have been the 'most prolific users' of the preliminary reference mechanism.[72] The following Section seeks to debunk and correct this assumption. A quantitative, comparative assessment of the uses of Article 267 TFEU by national courts reveals that German judges refer much less than the European average (Section A). As such, a very different image emerges – that of a hesitant judiciary reluctant to make full use of this procedure. This part will then explore factors that might cause this reluctance (Section B).

A. Comparative statistics

To start with, German references occupy, in absolute terms, the first place among the Member States. This is hardly surprising considering that Germany is by far the Member State with the largest population. In 2023, German references accounted for approximately 18 per cent (94 out of 518) of preliminary references.[73] This corresponds exactly to the share of German citizens in the Union's population. Against this backdrop, it could be argued that German courts are neither very active, nor overly passive when it comes to submitting preliminary references.

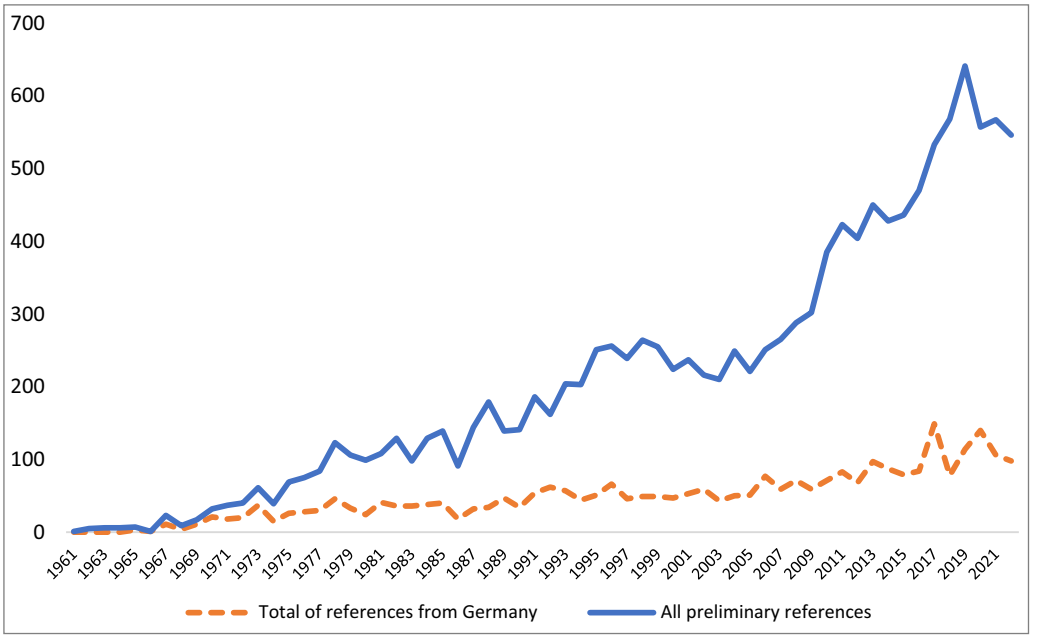

Figure 1. References from Germany in comparison to the total of references per year.[74]

[70]The first German reference was submitted by the Frankfurt administrative court in Judgment of 8 July 1965 in Case 10/65 *Deutschmann* EU:C:1965:75. See also P Hay, 'Supremacy of Community Law in National Courts: A Progress Report on Referrals under the EEC Treaty' 16 (1968) American Journal of Comparative Law 524, 526 ff and C Tomuschat, *Die gerichtliche Vorabentscheidung nach den Verträgen über die europäischen Gemeinschaften* (Heymann 1964) 3.

[71]Wägenbaur (n 2) para 95; Karpenstein (n 2) para 5.

[72]Davies (n 2) 438.

[73]CJEU, Annual Report 2023. Statistics concerning the judicial activity of the Court of Justice, p 11.

[74]The data has been gathered from the CJEU, Annual Report 2023 (n 73) p 11.

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Yet, this picture changes once placed in a comparative context. For one, the comparison with the total amount of references reveals that the overall share of German references has steadily declined over the years (Figure 1). Moreover, taking only the absolute references at face value does not offer much insight into whether German judges refer much or little.[75] Instead, many possible factors should be taken into account, such as references relative to population size (Figure 2), references per judges in a certain jurisdiction (Figure 3), or references per incoming cases (Figure 4). Further factors can be government expenditure within the judiciary, a Member State's share in intra-EU-trade, or the duration of its membership in the EU.[76] All these factors markedly alter the ranking. Specifically, Member States like Austria, Belgium, Bulgaria, Latvia, Luxembourg, or Ireland seem to take the lead, while German judges lack behind and refer below average.

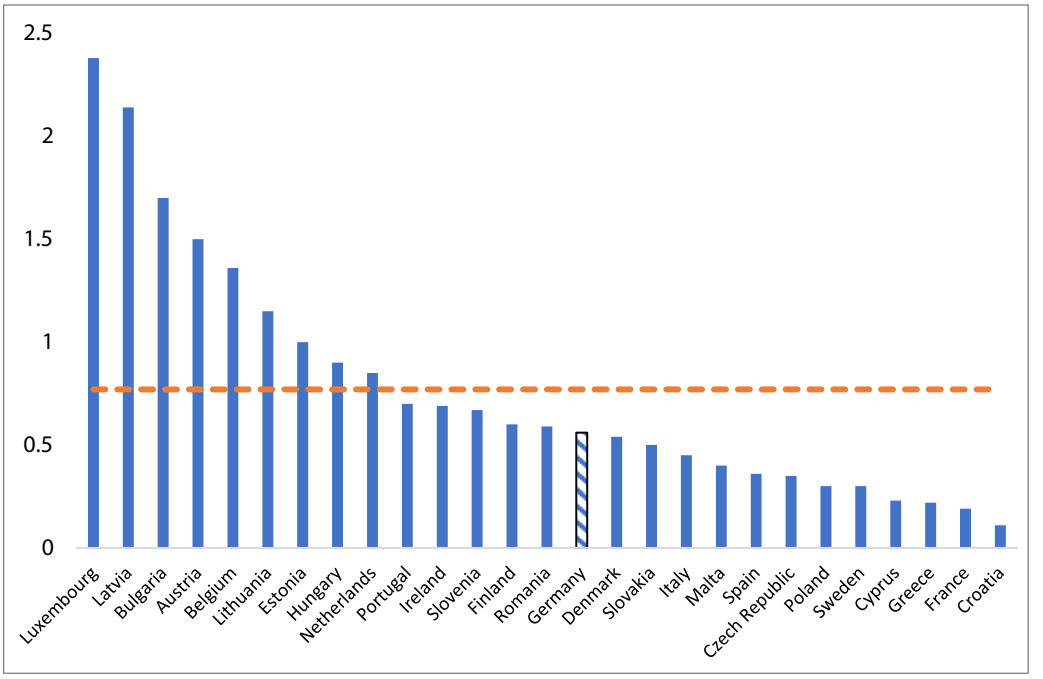

Figure 2. References per 500,000 citizens (in 2023) from 2009 to 2023.[77]

[75]This is no new insight. See H Rösler, 'Die Vorlagepraxis der EU-Mitgliedstaaten – Eine statistische Analyse zur Nutzung des Vorabentscheidungsverfahrens' 47 (2012) *Europarecht* 392, 404 f and MA Dauses, *Das Vorabentscheidungsverfahren nach Artikel 177 EWG-Vertrag. Ein Leitfaden für die Praxis* (Luxembourg 1986) 31 who point to the fact that the absolute numbers must be placed in context.

[76]For an overview, see Broberg and Fenger (n 59) 31 ff as well as M Broberg, N Fenger, and H Hansen, 'A Structural Model for Explaining Member State Variations in Preliminary References to the ECJ' 45 (2020) European Law Review 599 and M Broberg and N Fenger, 'Variations in Member States' Preliminary References to the Court of Justice: Are Structural Factors (Part of) the Explanation?' 19 (2013) European Law Journal 488, 493 ff.

[77]The total of references between 2009 and 2023 can be found in the CJEU's Annual Report 2023 (n 73) pp 31–2.

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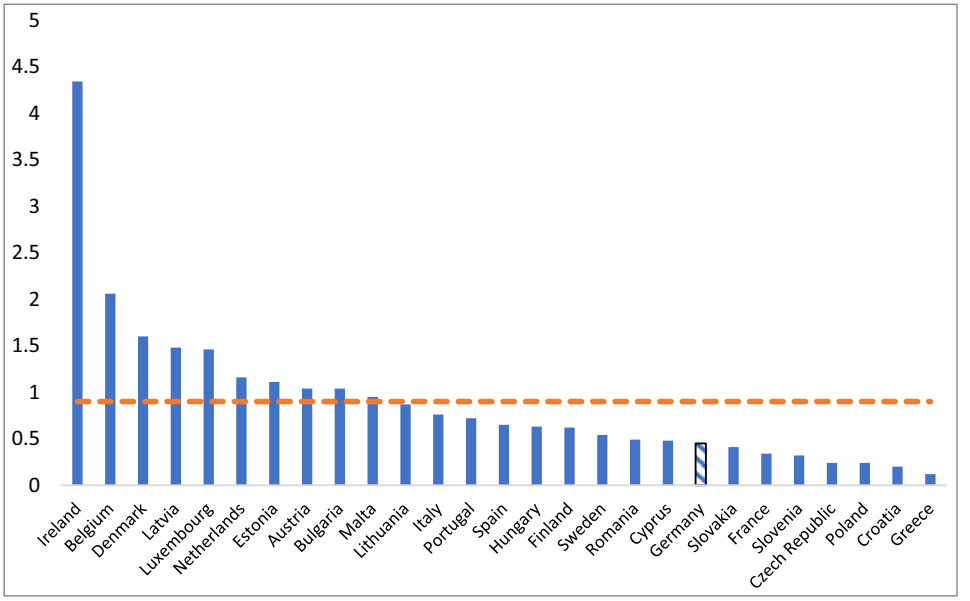

Figure 3. References per 100 judges (in 2020) from 2009 to 2023.[78]

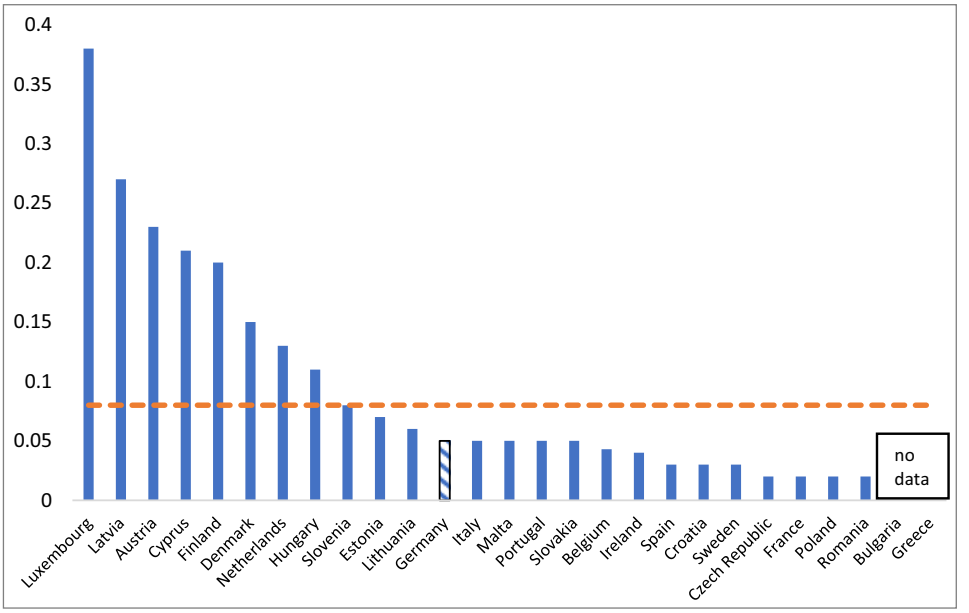

Figure 4. References per 1000 incoming civil and administrative cases before 1st instance courts (in 2020) from 2009 to 2023.[79]

[78]Data on the total number of judges in each jurisdiction for the year 2020 has been gathered from the Council of Europe's 'Dynamic database of European judicial systems', see <https://www.coe.int/en/web/cepej/cepej-stat>. See also <https://public.tableau.com/app/profile/cepej/viz/QuantitativeDataEN/Tables?publish=yes> accessed 21 March 2025.

[79]The total of incoming cases has been gathered by European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, see CEPEJ, *Study on the Functioning of Judicial Systems in the EU Member States*, Table 3.1.1.2b(2020): First instance courts, Caseload in the EU in 2020 (incoming cases per 100 inhabitants) (p 243). The available data indicates that the incoming cases per year during the past ten years have remained – despite some fluctuations – relatively stable, see EU-Justice Scoreboard 2024, COM/2024/950 final, pp 9 f, Figures 2–4.

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These statistics show that Germany occupies place No 15 in references relative to population size (see Figure 2), place No 20 in references relative to the overall number of judges (see Figure 3), and place No 12 in references relative to incoming civil and administrative cases in first instance courts (see Figure 4). It should be added that some have also placed the number of references in relation to the public expenditure in the judiciary. But also here, Germany occupies with place No 22 the back seat.[80]

Where then lies the problem? Can we locate the problem *geographically*? Is there a particular region with low referral rates? That does not seem to be the case. Daniel Kelemen and Tommaso Pavone have traced the emergence of preliminary references geographically. Their maps demonstrate that the distribution of references in Germany is fairly balanced – as is to be expected in a federal state.[81] Can we trace this reluctance to a specific *branch or tier of courts*? Again, the available evidence suggests that this is not the case. The *Bundesfinanzhof* has been the most referring tribunal among European courts. Since the creation of the preliminary reference mechanism, it has referred 362 cases to the Court of Justice. Among the federal courts, it is followed by the *Bundesgerichtshof* with 299 references, the *Bundesverwaltungsgericht* (165 referrals), the *Bundessozialgericht* (77 referrals) and, finally, the *Bundesarbeitsgericht* (68 referrals). Lower courts account for 2,106 references and thus for 68 per cent of all German references ever sent to the Court.[82] As Figure 5 demonstrates, this proportion has remained relatively stable over the years.

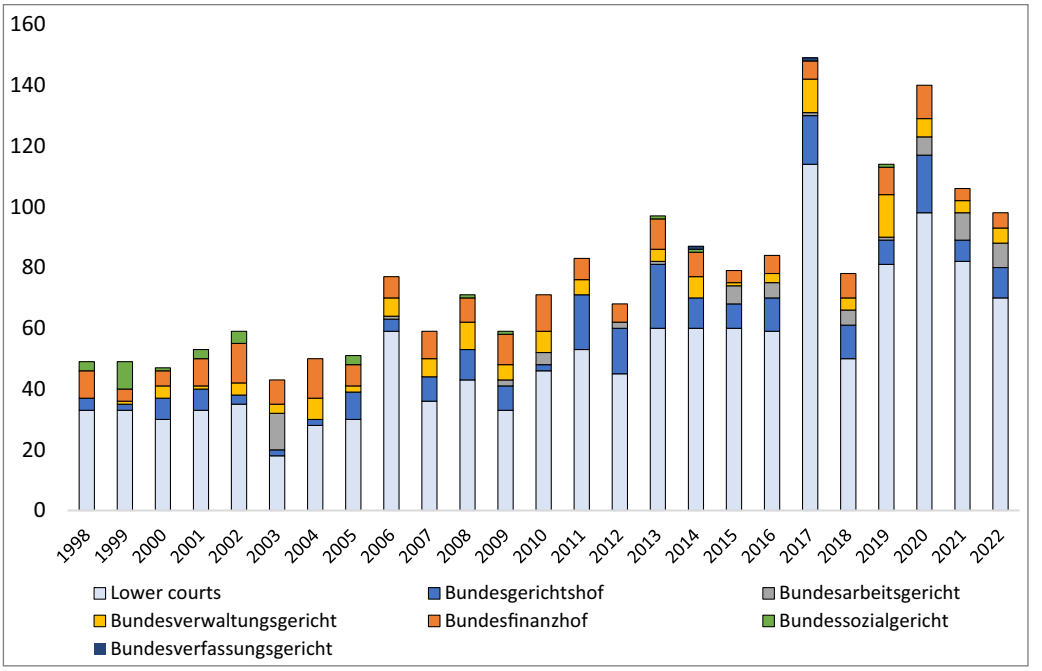

Figure 5. Share of German references by the type of courts.

[80]See the study Broberg and Fenger (n 59) 32.

[81]See T Pavone, 'Putting European Constitutionalism in Its Place: The Spatial Foundations of the Judicial Construction of Europe' (2020) 16 European Constitutional Law Review 669, 681; RD Kelemen and T Pavone, 'The Political Geography of Legal Integration' (2018) 70 World Politics 358, 372.

[82]CJEU, Annual Report 2023 (n 73) p 33.

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A comparative assessment demonstrates that this proportion is close to the European average. Whereas Danish (82 per cent), Spanish (82 per cent), Bulgarian (81,5 per cent) or Belgian (73 per cent) lower courts account for a high share in references, this is less the case for the lower courts in Austria (56 per cent) and Luxembourg (53,5 per cent), and even less so for those in the Netherlands (36 per cent), Finland (28 per cent), Ireland (24 per cent), or Lithuania (23 per cent).[83] In consequence, we cannot associate the low referral rate with one specific tier of courts. Conversely, these statistics suggest that the German judiciary – *taken as a whole* – is comparatively reluctant to use the preliminary reference procedure.

Certainly, this kind of quantitative comparison is prone to objections. In particular, one might argue that even if the share of German references is not as large as anticipated, their importance and quality is higher than that of their peers. Yet, notions such as 'importance' and 'quality' are difficult to define. What makes a case important? The value of the dispute? Hardly. *Costa/ENEL* concerned an electricity bill of 1,925 Italian Lire, which equals a couple of Euro today.[84] Then its impact on the EU legal order? Or its political implications? Such factors will inevitably involve subjective and controversial assessments. Probably the least controversial yardstick is the Court's own assessment. According to Article 60 of the CJEU's Rules of Procedure cases are assigned to chambers of three or four judges or to the Grand Chamber according to the 'importance of the case.' Once we look at the statistics, however, German references do not seem to be given more importance than other jurisdictions. Both references from France – an extremely reluctant jurisdiction – as well as from Ireland, Luxembourg, or the Netherlands are allocated to bigger formations than those emerging from Germany (Figure 6).

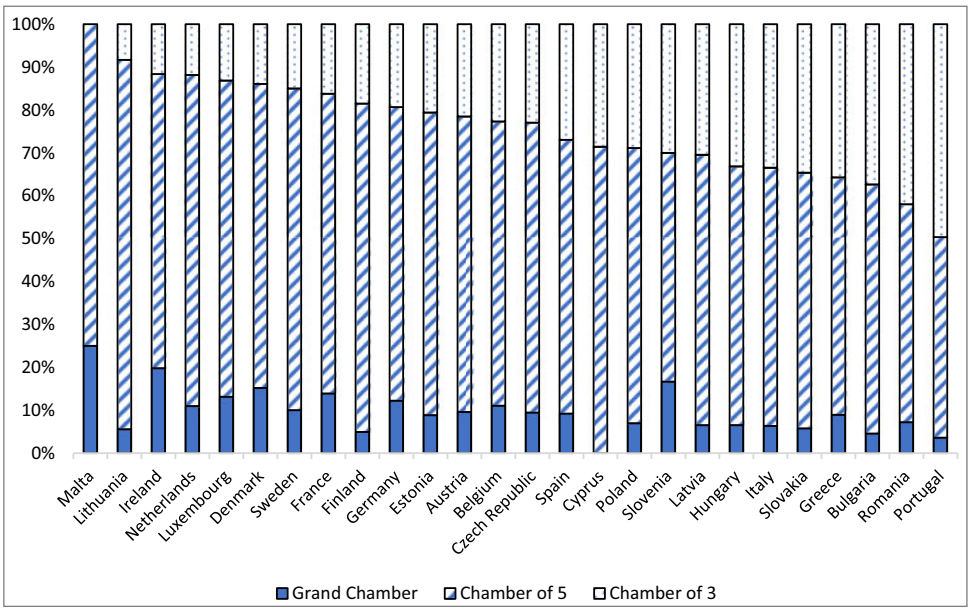

Figure 6. Allocation of references to formations of the Court from 2009 to 2023.[85]

[83]This data has been compiled from the CJEU's Annual Report 2023 (n 73) pp 33 ff.

[84]A Arena, 'From an Unpaid Electricity Bill to the Primacy of EU Law' 30 (2019) European Journal of International Law 1017.

[85]This data has been gathered by using the curia search function. The selected criteria were: Court = 'Court of Justice'; Formation of the Court = [enter the respective formation]; Period or date = 'Date of delivery'; period= 'from 01/01/2009 to 31/12/2023'; Procedure and result = 'Reference for a preliminary ruling', 'Preliminary reference – urgent procedure'; Source of a question referred for a preliminary ruling = [enter the Member State]; Documents = Documents published in the ECR : Judgments – Orders; Documents not published in the ECR : Judgments – Orders (All).

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Similar uncertainties will surround the notion of 'quality.' What makes a 'good' reference? Again, we can only paint with a very broad brush. A possibly 'bad' preliminary reference will be an inadmissible one as it does not fulfil its function of ensuring the uniform application of EU law and turns out to be unnecessary. The same might apply, albeit to a lesser extent, to questions which have already been answered by the Court, the reply to which can be clearly deduced from the case law, or the resolution of which does not leave any reasonable doubt. According to Article 99 of the Rules of Procedure, the Court can answer such questions by way of a reasoned order (Figure 7).

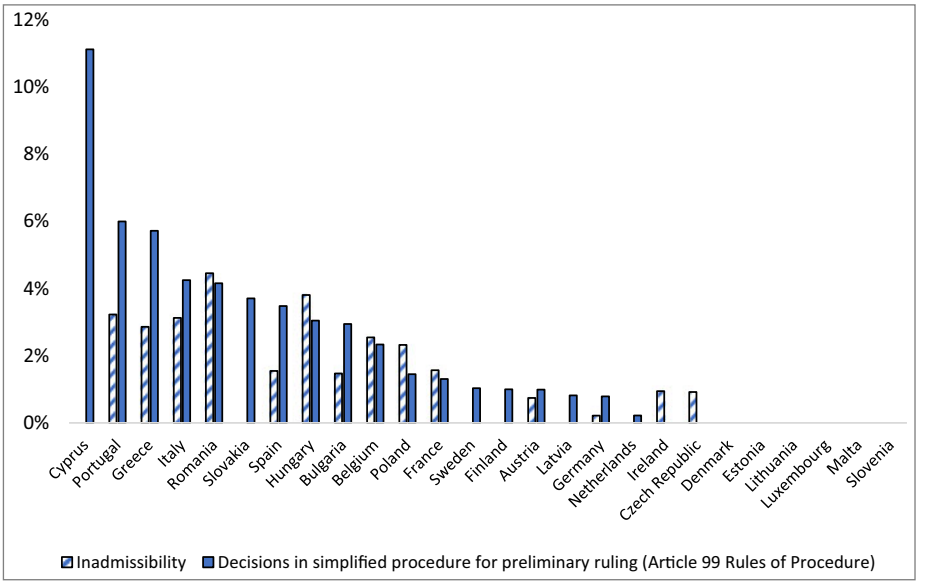

Figure 7. Share of inadmissible references/references decided by reasoned order from 2009 to 2023.[86]

Although German references are rarely declared inadmissible (around 0.2 per cent) or treated under the simplified procedure (around 0.8 per cent), this figure is close to other jurisdictions, such as Ireland, Luxembourg, or the Netherlands. This indicates that the quality of German references is not much higher than that of many of its peers with higher referral rates.

B. Possible reasons

How then can we explain this relatively low number of references? During the past years scholars have started identifying factors that might incentivise or disincentivise references. As Virginia Passalaqua noted, 'no single factor exhaustively explains the variation in the reference rates of judges.' Instead, there is a variety of interacting factors, partly structural and partly subjective

[86]This data has been gathered by using the curia search function. The selected criteria were: Court = 'Court of Justice'; Period or date = 'Date of delivery'; period= 'from 01/01/2009 to 31/12/2023'; Procedure and result = 'Reference for a preliminary ruling', 'Preliminary reference – urgent procedure'; Source of a question referred for a preliminary ruling = [enter the Member State]; Documents = Documents not published in the ECR : [select 'Orders (Inadmissibility – lack of jurisdiction (reference for a preliminary ruling)' or 'Orders (Simplified procedure for preliminary ruling)'].

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which influence judges' decisions.[87] In this spirit, the general systematisation developed by Broberg and Fenger might be useful in this respect.[88]

On a *structural* or macro level, they contend that several factors might incite the emergence of a suitable case, such as the Member State's expenditure for the legal system or its share in intra-EU trade. Further, one may add the general constitutional setup of a Member State, namely whether it opted for a strong or rather weak judiciary,[89] or the general willingness of citizens to go to court, including costs or *locus standi* criteria. With regard to Germany, however, most of these factors – especially the share in intra-EU trade, a strong judiciary, and the accessibility of courts – would rather support a stronger referral rate.

Another structural factor mentioned by Broberg and Fenger is the Member States' general compliance with EU law. If there is a 'habit of compliance', fewer contentious cases might emerge in the first place. Yet, this factor reveals several shortcomings. First, it remains extremely abstract and difficult to determine.[90] Second, it can cut both ways: while less compliance can generate more disputes that give rise to references, better compliance can go hand in hand with greater awareness and thus lead to more references as well. As such, this factor proves to be ambiguous at best. And third, it seems that a 'habit of compliance' would rather relate to disputes between public authorities and individual litigants and thus to administrative cases. Nevertheless, the reluctant application of EU law by German courts seems to permeate the entire German judiciary, including civil courts primarily tasked to resolve disputes between private parties.

Finally, one might argue that size matters. As Figures 2–4 demonstrate, Germany is not alone with its reluctant judiciary. Italy, France, Spain, and Poland remain below average as well considering references per population, judges, or cases. Indeed, it is striking that larger Member States are at the lower end of the spectrum, whereas smaller judiciaries take the lead. What might be the reason? Two tentative hypotheses could explain this correlation. On the one hand, a larger population might not necessarily mean more controversies. Instead, there might just be a certain 'amount' of controversy that will realistically arise in a certain legal system – irrespective of the size of its population. On the other hand, the larger the judiciary, the more references emerge in absolute terms. As such, it is more likely that the controversy at issue has already been referred to the CJEU. And even though national courts might not be necessarily aware of every judgment from Luxembourg and its potential impact on their own legal order, they will take note of references emerging from their own judiciary. Such preliminary rulings are much easier to digest as they are already embedded in a national procedural context and do not require any translation into the own legal system. Taken together, both hypotheses suggest that at a certain point the curve starts to flatten. If this is true, references will cease to rise in strict proportion to population, judges, or cases. And it might very well be that Germany – as well as Italy, France, or Poland – have crossed this point. In that case, a lower share in references is just an inevitability.

Can this fatalist attitude convince? In the EU context, the first premise seems especially shaky. All human interactions are unique. As such, they can give rise to an unlimited amount of possible legal constellations. Even though there are certainly run-of-the-mill cases, no case will ever be identical. Hence, it seems highly unlikely that there is any limit to controversies that can realistically arise in a given society. This applies especially in the EU, which faces not only the dynamics of society but constitutes a dynamic, constantly changing legal order itself.

[87]V Passalacqua, 'Legal Mobilization via Preliminary Reference: Insights from the Case of Migrant Rights' 58 (2021) Common Market Law Review 751, 755.

[88]See Broberg and Fenger (n 59) 31 ff See also Broberg, Fenger, and Hansen (n 76).

[89]For majoritarian democracy as a central factor disincentivising references, see M Wind, D Sindbjerg Martinsen and G Rotger, 'The Uneven Legal Push for Europe. Questioning Variation when National Courts go to Europe' 10 (2009) European Union Politics 63.

[90]This is admitted by Broberg and Fenger as well, who concentrate on opened infringement cases, (n 59) 36. However, this is an extremely broad brush and can hardly capture a culture of compliance with EU law at the level of individual disputes.

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Beyond such structural, macro factors, Broberg and Fenger add a *behavioural* or micro level factor, which concerns the readiness of the individual judge. At this level, they identify additional factors that may drive a judge to refer. Here, one can add a rather fuzzy bundle of factors that relate to the habitus of judges, such as their acceptance to submit themselves to a court beyond their immediate jurisdiction, or the judges' trust in the Luxembourg court.[91] Further, three, sometimes overlapping factors are deemed to be relevant: workload, hierarchy, and knowledge.[92]

Starting with the first, it is self-evident that a high workload can disincentivise referrals, tip the scales in favour of addressing immediate needs, and thus breed 'a habitus of non-referral.'[93] As Stone Sweet argued, we 'assume that national judges strongly prefer to dispose of their cases efficiently, that is, they would like to go home at the end of the day having disposed of more, rather than fewer, work-related problems.'[94] This will apply in particular to judges in career judge systems, where the focus lies on the efficient resolution of cases. While this explains why higher courts, which are usually better equipped and occupied by less cases, refer more than lower courts,[95] there is not much reliable comparative data on the workload of Member State courts. At least the incoming cases per judge demonstrate that German judges do not face a comparatively higher workload than their peers in other Member States (see Figure 4). Therefore, a high workload cannot be interpreted as a particularly German phenomenon.

Second, most authors refer to (the lack of) knowledge, when it comes to referring to the Luxembourg court. At first glance, it may seem questionable that, after 70 years of European integration and a subsequent permeation of EU law into the law school's curricula, basic knowledge concerning the preliminary reference procedure is an issue. This must especially apply to Germany as a founding Member State. Nevertheless, a study conducted by the European Parliament revealed astonishing deficits among German judges in this respect. 65 per cent of the asked judges and prosecutors replied that they have no or only a minor knowledge of how to refer a case to the Court of Justice.[96] Interestingly, this share was significantly lower than among judiciaries with higher referral rates, such as Austria (44 per cent), Luxembourg (40 per cent), Bulgaria (30 per cent), or Ireland (13 per cent). Whether simple modesty or serious concern, their

[91]On the various factors that increase trust, see J Mayoral, 'In the CJEU Judges Trust: A New Approach in the Judicial Construction of Europe' 55 (2017) Journal of Common Market Studies 551, 557 ff.

[92]See eg J Buchheim, 'Rechtsprechung ohne Fall. Strukturprobleme und Verbesserungspotentiale des unionsrechtlichen Vorabentscheidungsverfahrens' 148 (2023) *Archiv des öffentlichen Rechts* 521; T Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe* (Cambridge University Press 2022) 52 ff; M Glavina, 'To Refer or Not to Refer, That Is the (Preliminary) Question: Exploring Factors which Influence the Participation of National Judges in the Preliminary Ruling Procedure' 16 (2020) Croatian Yearbook of European Law and Policy 25. For a further set of factors relating to specific jurisdictions, see eg Nowak et al (n 3); Jaremba and Kappé (n 3); K Leijon and M Glavina, 'Why Passive? Exploring National Judges' Motives for Not Requesting Preliminary Rulings' 29 (2022) Maastricht Journal 263; A Wallerman, 'Who Is the National Judge? A Typology of Judicial Attitudes and Behaviours Regarding Preliminary References' in Wallermann and Rauchegger (n 3) 155, 161 ff; J Krommendijk, 'Why Do Lower Courts Refer in the Absence of a Legal Obligation?' 26 (2019) Maastricht Journal 770, 774; L Coutron, 'La Motivation des questions préjudicielles' in E Neframi (ed), *Renvoi préjudiciel et marge d'appreciation du juge national* (Larcier 2015) 101.

[93]Pavone (n 92) 77. Similarly, Buchheim (n 92) 532–4; Krommendijk (n 92) 784.

[94]A Stone Sweet, 'The European Court and the National Courts: A Statistical Analysis of Preliminary References' 5 (1998) Journal of European Public Policy 66, 73.

[95]See A Dyevre, M Glavina, and A Atanasova, 'Who Refers Most? Institutional Incentives and Judicial Participation in the Preliminary Ruling System' 27 (2020) Journal of European Public Policy 912; M Glavina, 'Judicial Hierarchy in the Preliminary Ruling Procedure' 5 (2020) European Papers 799, 816 ff; T Pavone, 'Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance' 6 (2018) Journal of Law and Courts 303.

[96]European Parliament, Judicial Training in the European Union Member States, Annex II, 2011, pp 141–55 <https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/pe453198_annex2_/pe453198_annex2_en.pdf> accessed 21 March 2025. This lack of knowledge among German judges is also supported by the field study conducted by Pavone (n 92) 64 ff and J Mayoral, U Jaremba, and T Nowak, 'Creating EU Law Judges, The Role of Generational Differences, Legal Education and Career Paths in National Judges' Assessment Regarding EU Law Knowledge' 8 (2014) Journal of European Public Policy 112.

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reply to this study supports the impression that German judges do not feel comfortable when it comes to the preliminary reference procedure.

Third, lower courts may be inclined to pass on the responsibility for referring to higher courts. The German appeal system offers an easy way out. As noted before, in many cases appeals are only admissible if granted by the court whose decision is supposed to be challenged (see Section 1.B). An appeal must be allowed if a case features 'fundamental significance.'[97] This is the case, when it seems likely that – looking ahead – the court of last instance will face a duty to refer under Article 267(3) TFEU.[98] In consequence, a lower court judge who does not refer is obliged to admit an appeal in case he or she holds a reference to be likely in second or third instance. This option relieves the judge to submit the reference to him or herself. Instead, they can simply grant the appeal – a practice often applied by lower courts.

Finally, the German judiciary seems to have a relatively low level of trust in the Court of Justice. According to a study conducted by Juan Mayoral, Germany scores lowest in terms of trust in the European judiciary compared to other jurisdictions. Only 68.61 per cent of German judges express trust into the Luxembourg court.[99] The factors for such a large distrust are complex. They might result from the German dualist system or the constitutional court's critical attitude towards EU law. Over thirty years, the latter has set a highly critical tone. Due to the court's high standing, it seems likely that this scepticism has pervaded the minds and hearts of German judges.

4. Misuses: the challenge of judicial contestation

The previous two sections sought to debunk the dominant narrative that German courts refer *more* than their peers. In this context, we analysed the multifaceted obstacles that German judges face when deciding whether to refer or not – both in terms of procedure and practice. The following section shifts to the second component of the 'reference champion' narrative, namely that German courts usually refer in *good faith*. This part will concentrate on problematic practices that constitute a further challenge to the proper workings of the preliminary reference procedure: its instrumentalization for purposes of judicial contestation.

Usually, there will be a bundle of considerations that motivate a judge to refer. Most seek to resolve the cases pending before them, some may perceive the reference as an additional layer of judicial protection, and others might aim at ensuring the uniformity of EU law. And then there may be instances where courts use references as a tool of contestation. Such patterns can be found all throughout the history of the German practice of preliminary references. Generally, they can occur in two ways. *Externally*, references can be used as a means of resistance against the impact of EU law, a practice widely applied by the German judiciary especially during the first three decades of this mechanism (Section A). *Internally*, references can empower courts to challenge the legislature, executive or higher courts, a strategy that is still prevalent in German courts (Section B).

Certainly, such references can serve other legitimate ends as well. Nevertheless, the preliminary reference procedure is instrumentalised beyond the purposes for which it was established, namely to clarify the meaning or validity of EU law in 'a relationship of close cooperation' with the Court of Justice.[100] Before diving into these issues, two brief disclaimers should be made. First, the following sections cannot provide any exhaustive assessment into cases of resistance and empowerment. Instead, they will focus on a few, select landmark rulings. And second, it cannot be

[97]See, in civil procedures, §§ 511(4) No. 1 and 543(2) No. 1 ZPO and, in administrative procedures, §§ 124a(1), 124(2) No. 2 and 132 VwGO.

[98]Generally, see BVerfG, Order of 8 October 2015 – 1 BvR 1320/14, para 13. For administrative procedures, see Bundesverwaltungsgericht, Order of 24 March 2016, 4 BN 41/15 and 45/15, para 10. For the same conclusion in civil procedures, see Bundesgerichtshof, Order of 16 January 2003, I ZR 130/02. See further Rauber (n 35) 52–3.

[99]Mayoral (n 91) 560.

[100]Case C-564/19 *IS (Illegality of the order for reference)* EU:C:2021:949, para 59.

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stressed enough that these possible misuses of referrals remain the exception. In many cases, courts will not be concerned with these issues but refer in 'good faith.'

A. Patterns of external resistance

German courts are credited with taking an active part in the judicial construction of Europe by providing constructive impulses for the development of EU law through the preliminary reference procedure. Yet, this is only one side of the story. Under closer scrutiny, a tale of contestation unfolds. Overshadowed by Karlsruhe's jurisprudence culminating in *PSPP*, it has almost been forgotten that the first uses of the preliminary reference procedure led to a heated confrontation between ordinary German courts and the Court of Justice. In this spirit, a senior Commission official noted in 1974 that 'conflicts with various branches of German law have been bound to occur more frequently than elsewhere.' He then added: 'Without wishing to dramatize the issue this is, in fact, the main obstacle to an absolute supremacy of Community Law.'[101]

Analysing these early cases of contestation is important. Patterns in the relationship among institutions and their personnel can develop early on and endure even if the wider context has changed. The rocky start in the interaction between the Court of Justice and the German judiciary might thus help explaining the persisting reluctance of many German judges to make use of the preliminary reference procedure. The following section will explore these early uses of this mechanism by contrasting two examples. It will start by focussing on the first open 'revolt' of German courts,[102] before taking a closer look at a supposed success story, namely the development of EU fundamental rights and the role played by the German judiciary.

Starting with the first example, most of the early German references emerged from tax courts. This was a consequence of one of the Communities' central aims, which was the creation of a customs union (Article 3(a) of the EEC Treaty).[103] Against this backdrop, a rather unlikely institution became Luxembourg's central German interlocutor: the *Bundesfinanzhof*. The other federal courts remained largely in the shadows and engaged relatively little with their European counterpart.[104] However, unlike its peers in other Member States, the federal fiscal court did not participate in constructing the new legal order. Instead, its references became a central vehicle to challenge the Court's early jurisprudence on direct effect and primacy. This led to an – today almost forgotten – period of open jurisdictional conflict between the Court of Justice and the German judiciary.

The first German refence that made a substantive leap in this respect was submitted by the tax court of Saarland.[105] In *Lütticke* it embraced the fairly new doctrine spelled out in *Van Gend* and asked whether Article 95 of EEC Treaty, which resembles today's Article 110 TFEU, had direct effect too. If this were the case, it wanted to know whether a specific German turnover tax on imported products would be compatible with this provision. The context slightly differed from *Van Gend* as the obligations under Article 95 were less specific. Importantly, it included a positive obligation for the Member States to take appropriate measures within a certain time frame. Despite these obstacles, the Court answered in the affirmative.[106]

[101]G Bebr, 'How Supreme Is Community Law in the National Courts' 11 (1974) Common Market Law Review 3, 25.

[102]T Stein in 23 (1986) Common Market Law Review 727, 734. See also H Rasmussen, *On Law and Policy in the European Court of Justice* (Nijhoff 1986) 12 ('revolting judicial behaviour').

[103]AK Mangold, *Gemeinschaftsrecht und deutsches Recht. Die Europäisierung der deutschen Rechtsordnung in historisch-empirischer Sicht* (Mohr Siebeck 2011) 415 ff.

[104]The first references emerged from the *Bundesarbeitsgericht* in Case 15/69 *Ugliola* EU:C:1969:46, from the *Bundessozialgericht* in Case 68/69 *Brock* EU:C:1970:24, from the *Bundesverwaltungsgericht* in Case 36/70 *Getreide Import* EU:C:1970:112 and, finally, from the *Bundesgerichtshof* in Case 32/74 *Haaga* EU:C:1974:116.

[105]Case 57/65 *Lütticke* EU:C:1966:34.

[106]This decision caused much stir among EU lawyers, see eg M Waelbroeck, 'The Application of EEC Law by National Courts' 19 (1967) Stanford Law Review 1248, 1272 ('revolutionary character ... The consequences of the decision for the

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By the end of 1967, this led to a flood of administrative appeals and claims for tax refunds in Germany (reportedly 332,000), more than 24,500 of which are said to have resulted in procedures before tax courts.[107] Under this pressure, the *Bundesfinanzhof* referred the question in *Molkerei* again to the Court, voicing 'concerns' and asking in essence whether it actually meant what it stated in *Lütticke*.[108] One can grasp the federal fiscal court's distress, when stressing that it is not for the German courts 'to anticipate, by thousands of separate decisions, the action of the legislature. . . or to make good its failure to act', especially since the infringement procedure confers on the Community the means to compel the States to observe the Treaty.[109] The Court nonetheless confirmed its prior interpretation.[110]

In parallel, the federal fiscal court raised objections with regard to primacy. Its first ever reference in *Neumann* concerned the validity of a regulation imposing a levy on the import of certain products from third countries. While generally adopting an affirmative view on the compatibility of the EEC Treaty with the Basic Law, it questioned whether the Treaty 'had the effect of transferring to the community the power to legislate' on matters coming under the fiscal sovereignty of the Member States.[111] In other words, it suggested that the Community institutions had acted *ultra-vires*. The Court of Justice nonetheless affirmed the validity of said regulation. Faced with this verdict, the federal fiscal court stressed that it is up to the national judge to decide whether and what kind of legal effects a valid provision of Community law produces in the domestic sphere. This includes the question of whether the application of Community law is precluded by provisions of national law, especially in case of conflict with national provisions of 'greater force.'[112] This is where national fundamental rights may kick in, which – after a careful assessment – were not infringed in the specific case.

Even more striking was the federal fiscal court's resistance against the direct effect of directives, which resulted in the first open defiance by German courts. Already in response to a reference by the Munich tax court, the Court of Justice had opened the door towards the direct effect of other acts than regulations.[113] This had led to discussions on whether this reasoning could equally apply to directives. In the aftermath of *Van Duyn*,[114] Luxembourg acknowledged that individuals could rely, among others, also on the second turnover tax directive.[115] This had led to severe repercussions in Germany and hundreds of thousands of tax refund claims. Against this backdrop, the *Bundesfinanzhof* expressly rejected the Court's jurisprudence as there was 'no reasonable doubt' that directives cannot unfold direct effect.[116] The Court, on the other, reaffirmed its ruling

development of Community law are incalculable'). See also N Catalano in 89 (11) (1966) *Il Foro Italiano* 186 ('un importante e coraggioso passo avanti, in ordine alla definizione delle norme del trattato direttamente applicabili'); P Pescatore, 'Diritto comunitario e diritto nazionale secondo la giurisprudenza della Corte di giustizia delle Comunità europee' 93 (4) (1970) *Il Foro Italiano* 37, 43 ('Non si può esagerare l'importanza di tale giurisprudenza . . . '); JL Mashaw, 'Ensuring the Observance of Law in the Interpretation and Application of the EEC Treaty' 7 (1970) Common Market Law Review 423, 428 ('a decision of signal importance').

[107]See Hay (n 70) 540 referring to statistics in (5) (1968) Außenwirtschaftsdienst des Betriebs-Beraters 193.

[108]Bundesfinanzhof, Order of 18 July 1967, VII 156/65, para 48. The case was early on understood as a 'challenge' to the CJEU's position on direct effect, see G Bebr, 'Directly Applicable Provisions of Community Law: The Development of a Community Concept' 19 (1970) International and Comparative Law Quarterly 257, 265.

[109]See the arguments of the Bundesfinanzhof mentioned in Case 28/67 *Molkerei* EU:C:1968:17, p 146.

[110]After implementing the verdict from Luxembourg, the case was subject to a complaint before the Bundesverfassungsgericht, which decided that no constitutional objections existed against the direct effect and primacy of Art. 95 EEC, see BVerfG, Judgment of 9 June 1971, 2 BvR 225/69, *Milchpulver*.

[111]Case 17/67 *Neumann* EU:C:1967:56.

[112]Referring to 'mit stärkerer Wirkkraft ausgestattete Normen anderer Art', see Bundesfinanzhof, Judgment of 10 July 1968, VII 198/63.

[113]The case concerned a 'decision', see Case 9/70 *Grad* EU:C:1970:78, paras 5 ff.

[114]Case 41/74 *Van Duyn* EU:C:1974:133, para 12.

[115]Case 51/76 *Verbond van Nederlandse Ondernemingen* EU:C:1977:12, para 23.

[116]Bundesfinanzhof, Order of 16 July 1981, VB 51/80.

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in *Becker*.[117] When this reference reached the Court of Justice, the *Bundesfinanzhof* even sent a copy of its previous decision to Luxembourg, having apparently not the slightest doubt about its position.[118]

A direct confrontation occurred when the Court of Justice was again confronted with a reference by a lower tax court in *Kloppenburg*. The Court re-emphasised that individuals can, in the absence of any implementation, immediately rely on directives.[119] The case was then appealed and ended up at the *Bundesfinanzhof*, which rejected the Court's interpretation, without re-referring the case to the Court of Justice.[120] Importantly, the federal fiscal court stated that interpretations under Article 177 of the EEC Treaty cannot extend the EEC's competence by conferring legislative competences to the Community in an area for which it may only issue directives. This episode of open backlash came to an end when the *Bundesverfassungsgericht* decided in *Kloppenburg* that the CJEU's decision was within the borders of sound legal interpretation, which ought to be accepted. Importantly, it stressed that the *Bundesfinanzhof*, though being a court of last instance and deviating from the Court of Justice's prior rulings, failed to make a preliminary reference. As such, it infringed the right to a lawful judge under Article 101(1) of the Basic Law.[121] However, this EU-friendly jurisprudence by the federal constitutional court did not last for long. Only six years later, it would render the *Maastricht* judgment, which foreshadowed a long-lasting, highly conflictual period in the relationship between Karlsruhe and Luxembourg.

The second example of early contestation can be found in the conflicts over fundamental rights protection at the Community level. Most scholars seem to agree that the Court's early fundamental rights jurisprudence can be credited to pushes by German courts. Still, the specifics of this interaction remain controversial. On the one hand, the role of the German constitutional court as a driving force behind these developments has been questioned.[122] On the other hand, the narration shifts between 'productive dialogue' and 'pushback.'[123]

Most accounts start with the judgment in *Stauder*.[124] This reference concerned a Commission decision permitting the sale of butter at reduced prices for recipients of social assistance.[125] To make such a purchase, the entitled person had to produce a special identification featuring his or her name, which arguably violated human dignity. The administrative court of Stuttgart asked the Court of Justice whether this decision complied with the 'the general legal principles of Community law in force.' In its reasoning, it argued that the German system of fundamental rights protection must, at least in part, be guaranteed equally by the Community institutions as an

[117]Case 8/81 *Becker* EU:C:1982:7, para 23.

[118]P Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' 8 (1983) European Law Review 155, 170.

[119]Case 70/83 *Kloppenburg* EU:C:1984:71.

[120]Bundesfinanzhof, Judgment of 25 April 1985, VR 123/84. Critically, see C Tomuschat, 'Nein und abermals Nein' 20 (1985) *Europarecht* 346–54; D Scheuing, 'Rechtsprobleme bei der Durchsetzung des Gemeinschaftsrechts in der Bundesrepublik Deutschland' 20 (1985) *Europarecht* 229, 264 ff, and even from tax courts themselves, see R Voß, 'Experiences and problems in Applying Article 177 of the EEC Treaty – From the Point of View of a German Judge' in H Schermers et al (eds), *Article 177 EEC: Experiences and Problems* (Elsevier Science 1987) 55, 72.

[121]BVerfG, Order of 8 April 1987, 2 BvR 687/85 – *Kloppenburg*.

[122]Contrast G Delledonne and F Fabbrini, 'The Founding Myth of European Human Rights Law' 44 (2019) European Law Review 178 with W Phelan, 'The Role of the German and Italian Constitutional Courts in the Rise of EU Human Rights Jurisprudence' 46 (2021) European Law Review 175.

[123]Contrast BU Bryde, 'The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism' in M Maduro and L Azoulai (eds), *The Past and Future of EU Law* (Hart 2010) 119, 124 with B Davies, 'Pushing Back: What Happens When Member States Resist the European Court of Justice?' 21 (2013) Contemporary European History 417.

[124]Already before *Stauder* the Court had ruled on issues of proportionality, non-discrimination, or ne bis in idem, see Bryde (n 125) 123.

[125]Case 29/69 *Stauder* EU:C:1969:57.

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unwritten part of Community law. It closed with an open warning: should the Court not follow this reasoning, then the German courts would intervene (Figure 8).

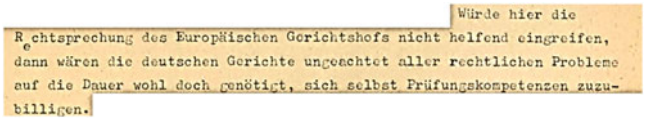
Würde hier die
Rechtsprechung des Europäischen Gerichtshofs nicht helfend eingreifen,
dann wären die deutschen Gerichte ungeachtet aller rechtlichen Probleme
auf die Dauer wohl doch genötigt, sich selbst Prüfungskompetenzen zuzu-
billigen.

Figure 8. Excerpt from the 'Stauder reference.'[126]

For some of the Luxembourg judges, like Pierre Pescatore, this reference arose 'quite unexpectedly.'[127] Yet, it was embedded in a rich German debate.[128] Some had already argued for a more prudent use of the preliminary reference procedure to protect fundamental rights immediately before the Court of Justice.[129] It is out of this thick discursive context, which hardly escaped the attention of the judges at the Stuttgart administrative court, that the reference in *Stauder* emerged.

While this reference was arguably quite cooperative, the following reference in *Internationale Handelsgesellschaft* was drafted much more in terms of contestation. The case concerned a regulation that required undertakings to lodge a deposit before receiving a licence for importing or exporting grain. The deposit was forfeited in case the imports or exports were not fully carried out. The administrative court of Frankfurt am Main refered the validity of this regulation to the Court of Justice. In its view, Community regulations had to respect the fundamental rights and principles guaranteed by the German constitution. In the event of contradiction, the primacy of Community law must yield before the principles of the Basic Law.

The Frankfurt court was informed and inspired by a critical domestic discourse.[130] Only three months before the reference, the prominent scholar Hans-Heinrich Rupp had given a speech at the *Deutsche Richterakademie*, in which he had described the Community as a 'Herrschaft ohne Grundrechte.'[131] In this spirit, the referring court noted that 'by ratifying the E.E.C. Treaty the Federal Republic has not renounced its rights . . . to protect elementary constitutional rights within the framework of a European Community. It must be assumed that the German legislator agreed to enter the E.E.C. only on condition that . . . essential structural principles of national law are protected in Community law.' (Figure 9)[132]

[126]Verwaltungsgericht Stuttgart, Order of 18 June 1969, VRS IV/103/69. The document can be found in the 'dossier de procedure original: affaire 26/69' in the Historical Archives of the European Union (Reference Code: CJUE-1072) <https://archives.eui.eu/en/fonds/245058> accessed 21 March 2025.

[127]P Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities' 18 (1970) American Journal of Comparative Law 343, 346.

[128]See the sources cited by the Commission representative in *Stauder* in his submission of 19 August 1969, CD Ehlermann, JUR/1943/69, p 15, which can be found in the dossier, see note 126. See also the 1959 and 1964 'Staatsrechtslehrertagung', where this issue was dominating, see the reports by G Erler and W Thieme in 18 VVDStRL (1959) as well as P Badura and JH Kaiser in 23 VVDStRL (1964). On this debate, see B Davies, *Resisting the European Court of Justice. West Germany's Confrontation with European Law, 1949–1979* (Cambridge University Press 2012) 73–8.

[129]See eg the former judge at the Court of Justice, O Riese, 'Über den Rechtsschutz von Privatpersonen und Unternehmen in der Europäischen Wirtschaftsgemeinschaft' in *Probleme des Europäischen Rechts: Festschrift für Walter Hallstein zu seinem 65 Geburtstag* (Klostermann 1966) 414.

[130]In detail, see B Davies, 'Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence' in F Nicola and B Davies (eds), *EU Law Stories* (Cambridge University Press 2017) 157, 159–63.

[131]See the speech given at 13 January 1970, published in HH Rupp, 'Die Grundrechte und das Europäische Gemeinschaftsrecht' (1970) *Neue Juristische Wochenschrift* 353.

[132]Verwaltungsgericht Frankfurt a.M., Order of 18 March 1970, Case II/2 E 228/69, the translation was provided by the Common Market Law Reports (1970) 294.

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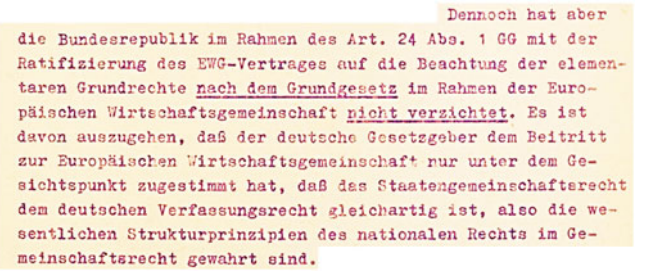
Dennoch hat aber die Bundesrepublik im Rahmen des Art. 24 Abs. 1 GG mit der Ratifizierung des EWG-Vertrages auf die Beachtung der elementaren Grundrechte nach dem Grundgesetz im Rahmen der Europäischen Wirtschaftsgemeinschaft nicht verzichtet. Es ist davon auszugehen, daß der deutsche Gesetzgeber dem Beitritt zur Europäischen Wirtschaftsgemeinschaft nur unter dem Gesichtspunkt zugestimmt hat, daß das Staatengemeinschaftsrecht dem deutschen Verfassungsrecht gleichartig ist, also die wesentlichen Strukturprinzipien des nationalen Rechts im Gemeinschaftsrecht gewahrt sind.

Figure 9. Excerpt from the 'Internationale Handelsgesellschaft reference.'[133]

In the present case, it reached the conclusion that the regulation infringed the freedom of action and disposition, economic liberty and the principle of proportionality guaranteed by Articles 2(1) and 14 of the German Basic Law.

Against this backdrop, the Court of Justice stressed that, to safeguard the uniform application of Community law, the latter cannot be submitted to national fundamental rights standards. Still, the respect for fundamental rights 'forms an integral part of the general principles of law' protected under Community law.[134] After a careful examination, the Court affirmed the validity of the regulation. Dissatisfied with the response, the administrative court referred the case under Article 100 of the Basic Law to the federal constitutional court in November 1971.[135] After examining in much detail the two camps in German legal scholarship and the position of its superior court,[136] it stipulated that the primacy of Community law 'cannot be based on any legal foundation.' The Court's position was characterised as being motivated by 'purely political' considerations, namely swift integration. Without engaging with the standards developed by the Court of Justice, the Frankfurt court argued that integration would eventually lead to a 'constitutional and legal vacuum.' Anticipating the later judgment by the federal constitutional court, it then noted that 'the national fundamental principles must be observed *so long as* there is no written constitutional law of the Community.' Before the referral in this case, Karlsruhe had left the issue open whether it would review Community law against the fundamental rights set out in the German Constitution.[137] In answering the call by the Frankfurt court, it took up the suggested formula and established what would be known as *Solange I*.[138]

What these two examples demonstrate is that the early interactions between the Court of Justice and the German courts through the preliminary reference procedure were highly conflictual. Importantly, these reactions were less driven by the federal constitutional court, which in many cases rather mitigated the backlash, but above all by ordinary courts, such as the federal tax court or the Frankfurt administrative court. These courts made ample use of the preliminary reference procedure to contain and contest the new doctrines of primacy and direct effect. Accordingly, the pattern of resistance did not only emerge long before Karlsruhe's jurisprudence in *Solange I, Maastricht*, or *Lisbon*, but was also intimately tied to the use of the preliminary reference procedure. These early instances of resistance might thus have shaped the understanding of many German judges of the purposes of the preliminary reference procedure – not as a tool of cooperation, but as a means of voicing contestation.

[133]The reference can be found in the dossier, HAEU Reference Code CJUE-1158 <https://archives.eui.eu/en/fonds/245210?item=CJUE-1158> accessed 21 March 2025.

[134]Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

[135]Verwaltungsgericht Frankfurt a.M., Order of 24 November 1971, Case II/2 E 228/69, see also Common Market Law Reports (1972) 177.

[136]The Verwaltungsgerichtshof Hessen adopted a similar stance in an order of 1 March 1971, VI OE 85/69.

[137]BVerfG, Order of 18 October 1967, 1 BvR 248/63 and 216/67, *EEC Regulations*.

[138]BVerfG, Order of om 29 May 1974, BvL 52/71, *Solange I*.

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B. Patterns of internal empowerment

At the same time, national courts have embraced the preliminary reference procedure not only as a tool of external contestation, but also as a tool of internal empowerment. Even if this narrative has shaped generations of EU legal scholars,[139] it has been subject to growing criticism. Under the empowerment thesis, judges often appear as power-hungry creatures pursuing their political agenda by judicial means. Court room realities are far removed from this theory. Most judges simply discharge their mandate and resolve the cases pending before them.[140] Nonetheless, there *are* instances, in which the preliminary reference procedure has been used as an empowering tool. Again, it should be stressed that such references can certainly serve legitimate aims (eg the protection of judicial independence or individual rights). Still, the instrumental use of references to broaden the referring court's powers goes beyond the purposes of this procedure and should be met with a critical eye.

Generally speaking, such an empowerment can unfold in three ways. First, the preliminary reference procedure can allow lower courts to *challenge the legislature*. This is nothing new. Generally, EU law empowers national courts in two ways, which are both supported by preliminary references. For one, it expands the ordinary courts' procedural powers. In case of conflict, they can set aside national laws, a power often reserved under national law to apex courts. Referring national legislation to Luxembourg can provide additional legitimacy when disapplying the respective law. This use of the references by German courts has been subject to much scholarly attention.[141] Far less explored, however, is the fact that EU law also expands the ordinary courts' substantive powers. National courts are not limited to review the legality of a legislative act, but also the rationality of legislative *policy choices*. One pertinent example is the so-called consistency requirement.[142] In many areas of EU law, national legislation is only proportionate if it is suitable to attain its objective in a 'consistent and systematic manner.' As such, the coherence and consistency of policy choices becomes subject to judicial review. An illustrative example is the German state monopoly in gambling. Several courts referred this monopoly to the Court of Justice arguing that it violates the freedom of establishment and the freedom to provide services. Though seeking to combat addiction, the respective act covered only certain games of chance while allowing private operators to exploit other ones with a similar potential of addiction, such as sports betting. According to the referring courts, this policy choice was 'evidently' inconsistent.[143] Framed in these terms, the Court of Justice largely followed this assessment.

Second, the preliminary reference procedure may empower the judiciary to *challenge the executive*. A recent example can be found in references that question the independence of German courts. In 2022, 70 per cent of German judges believed that judicial independence might come under threat, while 67 per cent considered it necessary to reinforce the autonomy of the

[139]K Alter, *Establishing the Supremacy of European Law* (Oxford University Press 2003). See already W Mattli, and AM Slaughter, 'The Role of National Courts in the Process of European Integration: Accounting for Judicial Preferences and Constraints' in AM Slaughter, A Stone Sweet, and JHH Weiler (eds), *The European Court and National Courts* (Hart 1998) 253. More recently, see J Mayoral, 'Judicial empowerment expanded: Political determinants of national courts' cooperation with the CJEU' 25 (2019) European Law Journal 374.

[140]Downplaying 'politico-strategic reasons', see also Krommendijk (n 92) 787 ff and Pavone (n 92) 39 ff.

[141]See only Alter (n 139).

[142]On the case law in healthcare, tax, or gambling issues, see eg J Langer and W Sauter, 'The Consistency Requirement in EU Law' 24 (2017) Columbia Journal of European Law 39, 53 ff; TI Harbo, 'The Criterion of "Consistent and Systematic Manner" in Free Movement Law' in M Andenas et al (eds), *The Reach of Free Movement* (Asser 2017) 205, 210 ff.

[143]Verwaltungsgericht Gießen, Order of 7 May 2007, 10 E 13/07 and Verwaltungsgericht Stuttgart, Order of 24 July 2007, 4 K 4435/06 leading to Joined Cases C-316/07 et al *Stoß* EU:C:2010:504, para106 and the Verwaltungsgericht Schleswig, Order of 30 January 2008, 12 A 102/06 leading to Case C-46/08 *Carmen Media* EU:C:2010:505, para 71.

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judiciary.[144] Concerns revolve especially around the independence of German courts from the executive: judges at the state level are appointed, appraised, and promoted by the ministry of justice in the respective *Land*. Further, the executive is responsible for the organisation, administration, and management of the courts, including the allocation of resources. This may create a 'reward' or 'penalty' system for judicial decision-making.[145] To challenge these perceived interferences by the executive and reassert their independence, some courts made a creative use of the preliminary reference procedure. In light of Luxembourg's pathbreaking judgments on the overhaul of the Polish judiciary, several German judges questioned their own independence thus inviting the Court to declare their references inadmissible. A first reference from the Wiesbaden administrative court was rejected though,[146] whereas a second one, which further substantiates these concerns, has been removed from the Court's register.[147]

Third, referring a case to Luxembourg can empower ordinary courts to *challenge their superior court*s. A good example is the bypassing of the federal constitutional court concerning the labour law of churches. The Basic Law guarantees the self-determination of religious groups, which includes their liberty to deviate from general labour law in areas devoted to their mission.[148] In this context, the federal labour court had to rule on the dismissal of a divorced doctor at a Catholic hospital, who had been dismissed after remarrying. The Catholic Church considered this as a breach of loyalty. Whereas the federal labour court had sided with the doctor, the federal constitutional court ruled – upon constitutional complaint by the church – in favour of the latter.[149] This result was based on a long-standing case law which placed the churches' right to self-determination at the centre. Especially the question of whether the activity of an employee was linked to the churches' ethos was largely withdrawn from judicial review. Instead of implementing this verdict though, the federal labour court contested this long-standing, controversial jurisprudence and referred to the Court of Justice.[150] By interpreting the Equal Treatment Directive, the Court stated that national judges must verify whether the requirements set up by churches for their employees are proportionate as well as 'genuine, legitimate and justified in the light of the ethos of the church.'[151] Applying these criteria, the *Bundesarbeitsgericht* sided, again, with the doctor. After noting the differences between Karlsruhe and Luxembourg, it briefly assessed whether there were any objections to the primacy of the latter's ruling, such as *ultra vires* or constitutional identity concerns, but refrained from referring the case to the Karlsruhe court again.[152]

[144]See the statistics by the Institut für Demoskopie Allensbach (IfD) in Roland Rechtsreport 2023, p 56 f. At the same time, 77 per cent of the general public perceive the independence of German courts to be at least 'fairly good', see Flash Eurobarometer 519 conducted between 16 and 24 January 2023.

[145]Landgericht Erfurt, Order of 15 June 2020, 8 O 1045/18.

[146]Case C-272/19 *Land Hessen* EU:C:2020:535, para 54. On the narrow handling of such references questioning the referring judge's own independence, see Case C-132/20 *Getin Noble Bank* EU:C:2022:235, paras 61–76. For cases of inadmissibility from Poland, see eg Case C-326/23 *Prezes Urzędu Ochrony Konkurencji I Konsumentów* EU:C:2024:940 and Case C-718/21 *Krajowa Rada Sądownictwa (Maintien en fonctions d'un juge)* EU:C:2023:1015. See also C Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' 17 (2021) European Constitutional Law Review 26; P Iannuccelli, 'L'indépendance du juge national et la recevabilité de la question préjudicielle concernant sa propre qualité de "juridiction"' (2020) *Il diritto dell'Unione* 823.

[147]Reference by the Landgericht Erfurt in Case C-276/20 *B (Indemnisation des acheteurs de véhicules munis de dispositifs d'invalidation)*. On this reference, see M Steinbeis, 'Dieselrichter in Deutschland?' (*Verfassungsblog*, 22 June 2020).

[148]In detail, see A Tischbirek, 'A Double Conflict of Laws: The Emergence of an EU "Staatskirchenrecht"?' 20 (2019) German Law Journal 1066.

[149]BVerfG, Order of 22 October 2014, 2 BvR 661/12.

[150]It should be noted that this was not the only reference by the Bundesarbeitsgericht that sought to submit churches to stronger judicial review and erode the position taken by the constitutional court. Another, more indirect example is Case C-414/16 *Egenberger* EU:C:2018:257.

[151]Case C-68/17 *IR* EU:C:2018:696. See also M van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' 1 (2022) European Law Open 89.

[152]Bundesarbeitsgericht, Judgment of 20 February 2019, 2 AZR 746/14.

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As was noted before, such cases of empowerment do not per se constitute illegitimate uses of the preliminary reference procedure. Nevertheless, they bear the potential to severely alter not only the separation of powers, but also the judicial architecture in Germany. Judicial hierarchies are not an end in themselves: equipped with greater resources, expertise, and authority the function of higher courts is to correct lower ones both in the interests of the rights of individuals and the coherence of the legal order. The empowerment of lower courts through preliminary references can undermine this function. On the one hand, it weakens the corrective function of their superior courts. Theoretically, higher courts can submit preliminary references to reassert their superiority, correct possible misunderstandings, and contain the lower courts within their jurisdiction. Yet, such exercises have had little success so far.[153] On the other hand, the empowerment of lower judges may weaken the authority of higher courts. The bypassing of the constitutional court by the *Bundesarbeitsgericht*, for instance, caused considerable stir among legal scholars and practitioners.[154] Such harsh reactions demonstrate that there is a real fear of deteriorating the federal constitutional court's authority. Especially in times when constitutional courts all over the world face increasing pressure,[155] we should be careful to further weaken the authority of a constitutional court. Such collateral damage is neither in the interest of the EU or the German legal order.

5. *Looking ahead*: the ambivalent appearance of the Bundesverfassungsgericht

What remains of the prevalent narrative of German courts as 'reference champions' after this analysis? Not much. The 'reference champion' is more myth than reality. Rather than being a role model for its peers in other Member States, this study has uncovered an uneasy relationship of German judges with the preliminary reference procedure. Ultimately, it has demonstrated that German judges do not refer more than their peers and has cast doubt on their faithful use of references. In sum, the preliminary reference procedure faces several challenges in German courtrooms: an ill-equipped procedural framework, a reluctant judiciary, and – since the very beginning – its instrumental use as a tool of contestation.

These challenges are a problem. Germany has by far the largest and most influential judiciary, providing a role model for many Member States and a main driver for the smooth functioning of the preliminary reference procedure. Moreover, that mechanism is at the very heart of the EU legal order and fulfils a bundle of crucial functions: it is an individual remedy compensating for the demanding standing requirements for direct actions before the Luxembourg court; it is a decentralised monitoring instrument for the uniform and effective application of EU law on the ground; and it fosters the development of the EU legal order through impulses from national courts. At the same time, the preliminary reference procedure is no top-down instrument or one-way street. Instead, it provides Member State courts with the opportunity to actively participate in the construction of the EU legal order. The challenges identified in this study weaken these functions and demonstrate the untapped potential of a stronger involvement of the German judiciary.

While possible remedies for these challenges must be left to further research, this study closes by shedding light on an emerging actor, which has been left aside so far: the

[153]For a whole series of admittedly rather old examples, see eg J Kokott, 'Report on Germany' in AM Slaughter, A Stone-Sweet, and JHH Weiler (eds), *The European Courts and National Courts* (Hart 1998) 77, 112.

[154]A former constitutional judge even suggested making referrals by lower courts regarding the compatibility of national and EU law dependent on an approval from Karlsruhe, see 'Ehemaliger BVerfG-Vizepräsident Kirchhof rügt EuGH', Beck-Aktuell (10 April 2019). For other proposals to restrict the lower courts' right to refer, see Buchheim (n 92) 576; J Komárek, 'In the court(s) we trust? On the need for hierarchy and differentiation in the preliminary ruling procedure' 32 (2007) European Law Review 467.

[155]A former constitutional judge even speaks of a 'worldwide crisis of constitutional courts', see A Voßkuhle, 'Die weltweite Krise der Verfassungsgerichtsbarkeit' 79 (2024) *JuristenZeitung* 1.

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Bundesverfassungsgericht. For a long time, the federal constitutional court has had an impact on European integration from the sidelines without any direct engagement with its European counterpart.[156] This has changed with the reference in *OMT*. Yet, the court's first appearances have left an ambivalent impression.

In this context, it should be noted that the federal constitutional court consists of two independent senates. The second senate is responsible for matters of state, including the relationship between EU law and national constitutional law. The first senate hears largely fundamental rights issues. During the last decade, both senates have increasingly engaged with the preliminary reference procedure – however by pursuing very different strategies when interacting with the Court of Justice. In this sense, the court has rightly been characterised as a 'two-faced guardian.'[157] The second senate's references emphasise its ultimate authority to declare, for instance, preliminary rulings of the Court of Justice *ultra vires* and thus inapplicable in the German legal order. In *PSPP* it made use of this option. The first senate, by contrast, started embracing Charter rights as possible yardsticks for its constitutional review of national acts that implement EU law. In the *Right to be forgotten II*, it stressed the need to interact with the Court of Justice in a spirit of cooperation. As such, these two strands of case law express different rationales. Whereas the second senate fortifies its references by pointing to the 'last word', the first senate has emphasised the powers of having the 'first word.' Put differently: the one seeks to rule by threat, the other by persuasion.

A. The second senate in PSPP: threat of the last word

Starting with *Solange I*, over *Maastricht* to *Lisbon*, the second senate has established a complex jurisprudence that showed its full impact when reviewing the EU's responses to the financial crisis.[158] In the wake of these decisions, it developed three, essentially interlinked review mechanisms: a fundamental rights, *ultra vires*, and constitutional identity review.[159] Eventually, this jurisprudence culminated in *PSPP*, in which the second senate declared the CJEU's judgment in *Weiss* to constitute an *ultra vires* act.[160] The decision provoked an outcry among EU legal scholars and practitioners, accusing the second senate of plunging the Union into a constitutional crisis. Today, *PSPP* might have become one of the most scrutinised judgments of the last decades. For the purposes of this study, however, it suffices to assess how the second senate handled the preliminary reference procedure.

Initially, the Karlsruhe court underlined that the review mechanisms mentioned before must be applied in the spirit of 'Europarechtsfreundlichkeit.'[161] Procedurally, this principle requires that the Court of Justice has an opportunity to interpret the EU law in question. As such, the preliminary reference procedure plays a central role. Substantively, the review mechanisms must be applied with restraint. Importantly, the Court of Justice must be permitted a margin of error.[162]

[156]This was no particularity of the German system though, see M Claes, 'Luxembourg, Here We Come? Constitutional Courts and the Preliminary Reference Procedure' 16 (2015) German Law Journal 1331.

[157]M Wendel, 'The Two-Faced Guardian – Or How One Half of the German Federal Constitutional Court Became a European Fundamental Rights Court' 57 (2020) Common Market Law Review 1383.

[158]See eg D Grimm, 'A Long Time Coming' 21 (2020) German Law Journal 944.

[159]C Calliess, 'Constitutional Identity in Germany: One for Three or Three in One?' in C Calliess and G van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (Cambridge University Press 2019) 153. Further, the identity review can bite before and after the ratification of the EU Treaties, see M Wendel, 'The Fog of Identity and Judicial Contestation: Preventive and Defensive Constitutional Identity Review in Germany' 27 (2021) European Public Law 465. In detail, see R Pracht, *Residualkompetenzen des Bundesverfassungsgerichts.* ultra vires*, Solange II, Verfassungsidentität* (Mohr Siebeck 2022).

[160]BVerfG, Judgment of 5 May 2020, 2 BvR 859/15, *PSPP*.

[161]For the *ultra vires* review, see BVerfG, Order of 6 July 2010, 2 BvR 2661/06, *Honeywell*, para 58–66; for the identity review, see BVerfG, Order of 15 December 2015, 2 BvR 2735/14, *Identitätskontrolle I*, para 46.

[162]BVerfG, *PSPP*, para 116 and *Honeywell*, para 66.

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Against this backdrop, the specific operation of the preliminary reference procedure in *PSPP*, but also its (non-)uses in cases such as *OMT* and *Identitätskontrolle I* leave much to be desired.

Procedurally, many have argued that *PSPP* was not a 'good faith' attempt to enter into dialogue.[163] On the one hand, the reference and the grounds on which the second senate declared the Court's response to be *ultra vires* hardly match. A central consideration of the second senate was the proportionality assessment conducted by the Court of Justice.[164] In stark terms, it dismissed the Court's approach as 'simply not comprehensible and thus objectively arbitrary.'[165] Curiously, the initial reference featured practically no elaboration on issues of proportionality.[166] If the second senate wanted the Court of Justice to conduct a detailed, substantive proportionality assessment of the ECB's actions, it should have made such a desire clear in its reference.

On the other hand, it could have referred a second time to the Court of Justice.[167] Even if this second reference would have yielded the same reply, a further referral would have demonstrated the second senate's willingness to engage in constructive dialogue. Here, the Italian *Corte Costituzionale* provides an alternative vision for how to structure and resolve a conflict with the Court of Justice. The *Corte* has been praised for its dialogical attitude throughout the *Taricco* saga.[168] After receiving a first answer from the Court of Justice (on a reference from a lower court), it re-referred the issue. In its second reference, it not only flagged its constitutional identity concerns, but also affirmed the importance of primacy, demonstrated why the CJEU judgment in question was not in harmony with *European* standards and made proposals for how to remedy the situation. In this sense, the *Corte* seems to have embraced what Marta Cartabia, its former president, described as a 'relational style' of constitutional adjudication.[169]

Also substantively, the decision in *PSPP* hardly lives up to the standards of a dialogue in good faith. First, it has been noted that the second senate ignored its previous requirements of restraint and the margin of error granted to its European interlocutor. Along these lines, Julian Scholtes qualified *PSPP* even as a 'relational abuse' of the court's constitutional identity doctrine.[170] Second, such a lack in relationality can also be traced in the decision's substance. Some have argued that the second senate voiced legitimate concerns. Ana Bobić, for instance, stressed that Karlsruhe sought to remedy the flaws it had over years been warning about – namely to provide more accountability for the Union's monetary policy.[171] However, the second senate could have articulated these concerns in a much more relational manner that renders these concerns

[163]T Flynn, 'Constitutional Pluralism and Loyal Opposition' 19 (2021) International Journal of Constitutional Law 241, 259.

[164]BVerfG, *PSPP*, para 123 ff.

[165]Ibid, para 118. Questioning this assessment, see M Wendel, 'Paradoxes of Ultra-Vires Review' 21 (2020) German Law Journal 979; T Marzal, 'Making Sense of the Use of Proportionality in the Bunderverfassunsgericht's PSPP Decision' (2020) *Revue des affaires européennes* 441; G Tesauro and P Depasquale, 'La BCE e la Corte di giustizia sul banco degli accusati del Tribunale costituzionale tedesco' (2020) *Il diritto dell'Unione – Osservatorio.*

[166]See only BVerfG, Order of 18 July 2017, 2 BvR 859/15, *PSPP*, para 122.

[167]J Basedow et al, 'European Integration: Quo vadis?' 19 (2021) International Journal of Constitutional Law 188, 204 f. In contrast to *Taricco*, see also JHH Weiler, 'Why Weiss?' 19 (2021) International Journal of Constitutional Law 179, 186.

[168]See eg D Sarmiento, 'Adults in the (Deliberation) Room. A comment on M.A.S.' 38 (2018) *Quaderni Costituzionali* 228; M Bonelli, 'The Taricco Saga and the Consolidation of Judicial Dialogue in the European Union' 25 (2018) Maastricht Journal 357; LS Rossi, 'M.A.S. e M.B. e la torre di Babele: alla fine le Corti si comprendono … pur parlando lingue diverse' in C Amalfitano (ed), *Primato del Diritto dell'Unione Europea e Controlimiti alla Prova della 'Saga Taricco'* (Giuffrè 2018) 153.

[169]M Cartabia, 'Courts' Relations' 18 (2020) International Journal of Constitutional Law 3 and Ibid., 'Of Bridges and Walls: The Italian Style of Constitutional Adjudication' 8 (2016) Italian Journal of Public Law 37, 42. See also A von Bogdandy and D Paris, 'La forza si manifesta pienamente nella debolezza' (2020) *Quaderni costituzionali* 9.

[170]J Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press 2023) 189 ff.

[171]A Bobić, 'Constructive versus Destructive Conflict: Taking Stock of the Recent Constitutional Jurisprudence in the EU' 22 (2020) Cambridge Yearbook of European Legal Studies 60. See also I Feichtner, 'The German Constitutional Court's PSPPrmat Judgment: Impediment and Impetus for the Democratization of Europe' 21 (2020) German Law Journal 1090, 1099 ff Critically, N de Boer, *Judging European Democracy* (Oxford University Press 2023) 281 ff.

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accessible for the Court of Justice. Instead of referring to the German conception of proportionality, it could have formulated the reference in terms of common Union values, such as the rule of law and democracy enshrined in Article 2 TEU.[172]

Finally, it should be stressed that conflicts between the Court of Justice and national courts can be a desirable feature that establishes checks and balances between the different legal orders.[173] The course of European integration demonstrates that this interaction is an important driving force for legal development. Even though this dialogue will inevitably lead to conflicts and open confrontation, it can play an important role in protecting certain constitutional principles. Yet, to untap the 'deliberative potential' of constitutional courts in this context, the dialogue with Luxembourg needs to remain constructive.[174]

B. The first senate in Right to be forgotten II: potential of the first word?

An indication for how a more cooperative dialogue could work in the future was provided by the first senate in its *Right to be forgotten II* decision. Following the path of other constitutional courts,[175] the first senate expressly embraced EU fundamental rights as a yardstick if the case under review is governed by provisions that are fully harmonised under EU law. Hence, it overruled its previous jurisprudence, which distinguished whether EU law leaves discretion for its national implementation or not.[176] Whereas the latter was excluded from review, the former was reviewed solely for its compliance with national fundamental rights.[177] After this decision, the federal constitutional court could become a guardian of EU fundamental rights.

This has several consequences for the preliminary reference procedure. *Internally*, it reorganises the judicial architecture. Under the previous case law, ordinary courts were the only ones to review the compatibility of national acts with the Charter and eventually refer these matters to the Court of Justice. The *Right to be forgotten II* changed this set up. In this context, the first senate expressly acknowledged its duty to refer under Article 267(3) TFEU and contemplated whether it would act – with regard to Charter issues – as court of last instance. This would shift the duty to refer under Article 267(3) TFEU to the constitutional court:

> If the ordinary courts remained subject to a duty of referral in such a scenario, the result would be that two courts could simultaneously be regarded as a court of last instance within the meaning of Art. 267(3) TFEU. Yet this does not appear plausible in a scenario where constitutional courts and ordinary courts co-exist . . . Nevertheless, given the particular features of the constitutional complaint, which constitutes an extraordinary legal remedy, it is not ruled out that the ordinary court of last instance may, in principle, be qualified domestically as the last instance even in respect of the interpretation of EU fundamental rights.[178]

[172]On this proposition, see already LD Spieker, 'Framing and Managing Constitutional Identity Conflicts' 57 (2020) Common Market Law Review 361, 386 ff.

[173]A Bobić, *The Jurisprudence of Constitutional Conflict in the European Union* (Oxford University Press 2022) 56 ff.

[174]See eg M Pivoda, 'Constitutional Courts Asking Questions: A Deliberative Potential of Preliminary Reference Mechanism' 25 (2023) Cambridge Yearbook of European Legal Studies 141, 152 ff.

[175]D Paris, 'Constitutional courts as European Union Courts: The Current and Potential Use of EU Law as a Yardstick for Constitutional Review' 24 (2017) Maastricht Journal 792. See also L Burgorgue-Larsen, 'La mobilisation de la Charte des droits fondamentaux de l'Union européenne par les juridictions constitutionnelles' 2 (2019) Titre VII 31; A Di Martino, 'Giurisdizione costituzionale e applicabilità della Carta dei diritti fondamentali dell'Unione europea' (2019) *Diritto pubblico comparato ed europeo* 759, 776 ff.

[176]BVerfG, Order of 6 November 2019, 1 BvR 276/17, *Right to be forgotten II*, paras 50, 67.

[177]BVerfG, 22 October 1986, 2 BvR 197/83, *Solange II*, para 132; 7 July 2000, 2 BvL 1/97, *Bananenmarkt*, para 57; 13 March 2007, 1 BvF 1/05, *Emissionshandel*, para 68.

[178]BVerfG, Order of 6 November 2019, 1 BvR 276/17 – *Right to be Forgotten II*, para 73.

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It remains to be seen how Karlsruhe will develop this jurisprudence and whether it intends to monopolise Charter-related referrals thus acting as a sort of gatekeeper.[179] *Externally*, the first senate seeks a much closer, less conflictual cooperation with the Court of Justice. In this spirit, it understands itself as a court of last instance under Article 267(3) TFEU that is obliged to bring such matters before the CJEU and emphasises the latter's 'final authority for interpreting EU law.'[180]

Many have applauded this step. This new approach allows the federal constitutional court to actively engage in the development of EU law.[181] In this sense, some have interpreted the first senate's decision as reasserting its authority in matters of fundamental rights.[182] Admittedly, national judges cannot instruct the Court of Justice to adopt a specific interpretation. This does not mean, however, that engaging with the Charter constitutes an act of submission. By referring to Luxembourg, national constitutional courts can influence the framing of a case and provide their provisional view on the respective issues. This might nudge the Court of Justice in a certain direction.[183] Power can be found not only in the 'final' but also in the 'first word.'[184] This is especially the case for national apex courts. As empirical evidence suggests, the CJEU attaches great importance to references of such peak courts.[185]

Despite this positive outlook, the realities in the aftermath of the *Right to be forgotten II* leave us with a mixed picture. Many observers, including judges from the first senate, expected an increasing number of references.[186] Especially in the case itself, such a reference would have been possible, some might say even necessary.[187] So far, no new references have been submitted by the first senate. As such, the full potential of having the 'first word' has not materialised yet. At the same time, the second senate has largely accepted its twin's jurisprudence.[188] While wielding the stick of its review mechanisms, which remain applicable in these cases, it struck a much more conciliatory tune: the guarantee of fundamental rights under the Charter will – usually – not result in a violation of the German constitutional identity.[189] The path towards a more cooperative dialogue through the preliminary ruling mechanism has thus been laid – now the constitutional judges need to follow it. As a role model for the entire judiciary, it could thus incite a more positive view on the preliminary reference procedure in the hearts and minds of German judges.

Acknowledgements. I whish to thank the 'Werkstattgespräch' at the Law & Society Institute of Humboldt University Berlin for very helpful feedback, especially Jonas Bornemann, Sivila von Steinsdorff, Ruth Weber, and Nils Weinberg as well as Davor Petrić.

[179]See U Karpenstein and M Kottmann, 'Vom Gegen- zum Mitspieler – Das BVerfG und die Unionsgrundrechte' 31 (2020) *Europäische Zeitschrift für Wirtschaftsrecht* 185; L Eichhorn and F Meixner, '(K)eine Pflicht zur Vorlage an den EuGH für letztinstanzliche Fachgerichte?' 76 (2023) *Neue Juristische Wochenschrift* 1911.

[180]BVerfG, Order of 6 November 2019, 1 BvR 276/17 – *Right to be Forgotten II*, para 69.

[181]On these advantages, see Paris (n 175) 815; C Rauchegger, 'National Constitutional Courts as Guardians of the Charter: A Comparative Appraisal of the German Federal Constitutional Court's Right to Be Forgotten Judgments' 22 (2020) Cambridge Yearbook of European Legal Studies 258, 275–8.

[182]Even as pushback, see D Burchardt, 'Backlash against the Court of Justice of the EU?' 21 (2020) German Law Journal 1, 8 ff.

[183]For the considerable influence of such provisional views on the CJEU's interpretation, see G de Búrca, 'The Mutual Judicial Influence of National Courts and the European Court of Justice through the Preliminary Rulings Mechanism' in E Fisher et al (eds), *The Foundations and Future of Public Law* (Oxford University Press 2020) 107, 115 ff. Sceptical concerning this influence, see A Wallerman Ghavanini, 'Mostly Harmless: The Referring Court in the Preliminary Reference Procedure' 47 (2022) European Law Review 310 and D Petrić, 'National Courts Proposing Answers to the Questions Referred for Preliminary Ruling' (2024) *Zeitschrift für Europarechtliche Studien* 3.

[184]See eg N Lupo, 'The Advantage of Having the First Word in the Composite European Constitution' 10 (2018) Italian Journal of Public Law 186 and Thym (n 1) 204.

[185]M Ovádek, W Wijtvliet, and M Glavina, 'Which Courts Matter Most?' 12 (2020) European Journal of Legal Studies 121.

[186]G Britz, 'Kooperativer Grundrechtsschutz in der EU' 74 (2021) *Neue Juristische Wochenschrift* 1489.

[187]Wendel (n 157) 1412.

[188]See BVerfG, Order of 1 December 2020, 2 BvR 1845/18 and 2 BvR 2100/18, *European Arrest Warrant III*, para 35.

[189]Ibid., para 40.

https://doi.org/10.1017/elo.2025.12 Published online by Cambridge University Press

Funding statement. This work received no specific grant from any funding agency, commercial or not-for-profit sectors.

Competing interests. The author has no conflicts of interest to declare.

Cite this article: LD Spieker, 'Debunking the reference champion: on uses, non-uses, and misuses of preliminary references by German courts' (2025) *European Law Open*. https://doi.org/10.1017/elo.2025.12